No. 317

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United States Court of Appeals for the First Circuit.

No. 5188.

ESSO STANDARD OIL COMPANY,
PLAINTIFF, APPELLANT,

v.

SECATORE'S, INC.,
DEFENDANT, APPELLEE.

RECORD APPENDIX TO BRIEF FOR APPELLANT.

ROBERT W. MESERVE,
NUTTER, MCCLENNEN & FISH,
75 Federal Street, Boston 9, Mass.,

CHARLES W. BARTLETT,
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Attorneys for Appellant.

Of Counsel:
JOHN R. HALLY,
AUSTIN BROADHURST.

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RECORD APPENDIX.

In the United States District Court for the District of Massachusetts.

Civil Action No. 56-790-W.

ESSO STANDARD OIL COMPANY

v.

SECATORE'S, INC.

Docket Entries.

1956		
Sep	12	Complaint filed. Summons issued.
	12	Motion for preliminary injunction filed. Assigned for hearing on Sept 20 1956 at 9.30 AM.
	20	Marshal's return of summons with service on Sept. 14th. Marshal's return on service of writ with service on Sept. 14th.
	20	WYZANSKI, J. Hearing on motion for preliminary injunction; evidence; taken under advisement. Briefs to be filed by 10 AM Sept 25th, reply briefs 48 hours thereafter.
	25	Briefs filed.
	26	Pltfs reply brief filed.
	27	Answer filed by defendant
Oct.	3	WYZANSKI, J. Opinion filed. Injunction to issue. copies to counsel
	5	Bond in the sum of $1000. filed and approved.
	5	WYZANSKI, J. Preliminary injunction issued. copy of Preliminary injunction mailed to Mr. Rosa

	9	Marshal return of service of injunction with service filed.
	15	Court Reporter's transcript of hearing Sep 20, 1956, filed.
Nov	16	WYZANSKI, J. Court trial begins; motion to amend deft's answer filed—allowed as to 5th and 7th defenses, denied as to 6th defense; evidence.
	21	Stenographic record of hearing on Nov. 16, '56, filed.
	21	WYZANSKI, J. Court trial continues; stipulation #1 filed; evidence; arguments. Temporary injunction vacated forthwith. Opinion to be filed.
	21	WYZANSKI, J. Opinion. Judgment entered vacating Preliminary Injunction and dismissing complaint on the merits. Judgment filed.
	27	Stenographic record of hearings (2 vols) on Nov. 21, '56, filed.
	27	Notice of appeal filed by the plaintiff. Copy of n/a mailed to Albert U. Rosa, Esq., 18 Meridian St., Esq Boston
	27	Bond for costs on appeal filed. (Federal Insurance Co. as surety).
	27	Original papers for record on appeal delivered to the U.S. Court of Appeals.

Complaint.

[Filed September 12, 1956.]

To the Honorable the Judges of the United States District Court in and for the District of Massachusetts:

Now comes the Plaintiff in the above-entitled case and complains against the Defendant as follows:

1. Plaintiff is a corporation organized under the laws of the State of Delaware duly authorized to do business in the

Commonwealth of Massachusetts having an office at 135 Clarendon Street in the City of Boston in the County of Suffolk.

2. The Plaintiff for many years has been and is now engaged in the refining, sale and distribution in Massachusetts and elsewhere of various petroleum products including motor fuels.

3. The Plaintiff has long marketed motor fuels known as "Esso" and "Esso Extra", which are trademarks, brands and names owned by the Plaintiff.

4. The Defendant, Secatore's, Inc., a Massachusetts corporation, doing business at 295 Waldemar Avenue and Day Square, East Boston, Massachusetts, is engaged in the sale, at retail, of motor fuels and other petroleum products including the Plaintiff's motor fuels known as "Esso" and "Esso Extra" at said service station.

5. The motor fuels of the Plaintiff aforesaid "Esso" and "Esso Extra" are dispensed from vending equipment bearing the Plaintiff's trademarks, brands or names, "Esso" and "Esso Extra" and are sold in free, fair and open competition in the Commonwealth of Massachusetts with products of the same general class which are produced and distributed by others.

6. The Plaintiff has expended, and is now spending, large sums of money in promoting and advertising its "Esso" and "Esso Extra" motor fuels aforesaid, and over many years has established and is maintaining a valuable reputation and good will in its name for said motor fuels and for the trademarks, brands and names under which they are produced and sold.

7. Acting pursuant to the authority of General Laws, Chapter 93, Section 14A-14C inclusive, the Plaintiff entered into, and there are now in effect, Fair Trade Agreements with retail motor fuel dealers in the Commonwealth of Massachusetts, under and by which the Plaintiff has

established minimum retail prices for its trademarked, branded and named motor fuels "Esso" and "Esso Extra". A copy of one of such Fair Trade Agreements is attached hereto, made a part hereof, and marked Exhibit "A".

8. On August 7, 1956, the Plaintiff notified the Defendant of its Fair Trade Agreements aforesaid, of the stipulated minimum retail prices provided thereunder for the Plaintiff's said motor fuels "Esso" and "Esso Extra", effective August 8, 1956, of 20.9 cents per gallon and 23.9 cents per gallon respectively, exclusive of Federal and State taxes, and pursuant to the provisions of Massachusetts Fair Trade Act, said stipulated minimum retail prices were binding on all retail sales of "Esso" and "Esso Extra" motor fuels in the Commonwealth of Massachusetts. A copy of the notice sent to the Defendant is attached hereto, made a part hereof and marked Exhibit "B".

9. On, or shortly prior to September 11, 1956, the Plaintiff was informed that the Defendant was advertising and offering for sale, and was selling at retail, from pumps bearing the Plaintiff's trademarks, brands and names, "Esso" and "Esso Extra", Plaintiff's motor fuels "Esso" and "Esso Extra" at prices lower than the minimum retail prices provided for in the Plaintiff's Fair Trade Agreements aforesaid and in violation of the Massachusetts Fair Trade Act.

10. On September 11, 1956, the Plaintiff sent to the Defendant by Registered Mail, Return Receipt Requested, a letter advising him that the sale, at retail, in the Commonwealth of Massachusetts of the Plaintiff's "Esso" and "Esso Extra" was subject to Fair Trade practices, and a demand that the Defendant desist from selling the Plaintiff's motor fuels "Esso" and "Esso Extra", at prices below the minimum retail prices established by the Plaintiff's Fair Trade Agreements aforesaid. A copy of said

letter is attached hereto, made a part hereof and marked Exhibit "C".

11. On September 12, 1956, the Defendant, at his places of business at 295 Waldemar Avenue and Day Square, East Boston, Massachusetts, willfully and knowingly advertised and offered for sale and sold the Plaintiff's motor fuel, "Esso", at a price of 26.9 cents per gallon, and Plaintiff's motor fuel, "Esso Extra", at a price of 29.9 cents per gallon, inclusive of Federal and State taxes, which amount to 8 cents per gallon.

12. At the time referred to in paragraph 11 hereof, the minimum retail sales price for the Plaintiff's motor fuels, "Esso" and "Esso Extra", by the Plaintiff's Fair Trade Agreements as aforesaid were respectively 20.9 cents per gallon and 23.9 cents per gallon, exclusive of Federal and State taxes.

13. By reason of the Defendant's advertising, offering for sale, and selling the Plaintiff's trademarked, branded and named motor fuels, "Esso" and "Esso Extra", in unfair competition and in violation of Massachusetts Fair Trade Act, the Defendant will cause and induce other retail gasoline dealers in the Commonwealth of Massachusetts to advertise, offer for sale, and to sell the Plaintiff's said motor fuels at less than the stipulated minimum retail prices established by the Plaintiff's Fair Trade Agreements aforesaid.

14. The unlawful acts of the Defendant aforesaid has caused, is causing and will continue to cause the Plaintiff's system of distribution and its entire marketing structure in the Commonwealth of Massachusetts to be substantially and irreparably damaged, demoralized and disrupted, causing loss of sales of Plaintiff's motor fuels, "Esso" and "Esso Extra", and Plaintiff has been, is being and will continue to be deprived of the benefits of its Fair Trade Agreements aforesaid and of the Massachusetts Fair Trade Act.

15. The unlawful acts of the Defendant as aforesaid, and the continuation thereof, have caused and will continue to cause the Plaintiff immediate, irreparable and substantial damage; they have impaired and destroyed and will impair and destroy Plaintiff's valuable good will and the value of the Plaintiff's trademarked, branded and named "Esso" and "Esso Extra"; and they have and will severely injure the Plaintiff's business.

16. The amount in controversy exceeds Three Thousand Dollars ($3,000), exclusive of interest and costs.

17. Plaintiff is without adequate remedy at law.

WHEREFORE THE PLAINTIFF PRAYS:

1. That, after a hearing, the Defendant, his servants, agents and employees, and all persons acting in concert with him or under his authority and control be temporarily enjoined from advertising, offering for sale or selling at retail, the Plaintiff's motor fuels, "Esso" and "Esso Extra", from vending equipment bearing the Plaintiff's trademarks, brands or names, "Esso" and "Esso Extra", or otherwise, at prices less than the minimum retail sales prices now established or subsequently established by the Plaintiff's Fair Trade Agreements entered into by the Plaintiff.

2. That the Defendant, his servants, agents and employees and all persons acting in concert with him or under his authority and control be permanently enjoined and restrained from advertising, offering for sale or selling at retail, the Plaintiff's motor fuels, "Esso" and "Esso Extra", from vending equipment bearing the Plaintiff's trademarks, brands or names, "Esso" and "Esso Extra", or otherwise, at prices less than the minimum retail sales prices now established or subsequently established by the Plaintiff's Fair Trade Agreements entered into by the Plaintiff.

3. That the Plaintiff may have such further relief as may be just and equitable.

ESSO STANDARD OIL COMPANY
By its Attorneys,
ELY BARTLETT THOMPSON & BROWN
Ely, Bartlett, Thompson & Brown
294 Washington Street
Boston 8, Massachusetts
CHARLES W BARTLETT

A.

[Admitted in evidence as Plaintiff's Exhibit A-1, R. p 21.]

FAIR TRADE AGREEMENT

AGREEMENT made August 8, 1956, between ESSO STANDARD OIL COMPANY, a Delaware corporation, with an office at 135 Clarendon Street, Boston 17, Massachusetts (hereinafter called the "Company") and

Emil Boulerice and
William L. Foote
Name

78 Vernon Street
Street Address

Springfield, Massachusetts
City State

(hereinafter called "Dealer").

WITNESSETH:

WHEREAS, the Company's motor fuel products are and will be distributed under the Company's trade marks, brands or names, in free, fair and open competition with commodities or products of the same general class produced or distributed by others and Dealer is engaged in selling said products at retail and the parties hereto desire

to avail themselves of the benefits of the Fair Trade Act of the state in which Dealer's place of business is located, and the Acts of Congress relating thereto now and hereafter in effect, to the full extent permitted by said Acts:

NOW, THEREFORE, in consideration of the premises and of the sale of said products by Dealer under said trade marks, brands or names and of the mutual obligations herein assumed, the parties agree as follows:

1. Dealer will not (except as specifically permitted by statute) advertise, offer for sale, or sell said products which Dealer has purchased or now has on hand or may hereafter purchase, at less than the following stipulated minimum retail selling prices:

Motor Fuel Products	Stipulated Minimum Retail Price
Esso	20.9¢ per gallon plus Federal & State Taxes
Esso Extra	23.9¢ per gallon plus Federal & State Taxes
Golden Esso Extra	26.9¢ per gallon plus Federal & State Taxes

2. The Company may at any time and from time to time upon written notice to Dealer change said minimum prices for any or all products now or hereafter included in this Agreement or add products to this Agreement and stipulate minimum retail prices therefor or remove products from this Agreement and any such change, addition or removal shall be effective on and after the date specified in such notice. Each such notice shall be considered an amendment to and a part of this Agreement and the notice last furnished to Dealer shall govern the sale at retail of said products by Dealer.

3. The offering or giving of any article of value in connection with the sale of any of said products, or the offering free, or the offering for sale, or selling of any of said products in combination with any other merchandise, which offer or sale has the practical result of reducing the

selling price of any of said products below the minimum selling price stipulated herein, in violation of the provisions or intent of said Fair Trade Act, shall constitute a breach of this Agreement.

4. The Company will employ all reasonable lawful means to obtain and enforce general observance of the minimum retail selling prices established by this Agreement.

5. This Agreement shall continue in effect until terminated by either party upon five days' written notice to the other, mailed to the latter's address as set forth above.

6. This Agreement shall be binding upon the successors and assigns of the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed the day and year first above written.

ESSO STANDARD OIL COMPANY
By B F Shea
Division Manager
Emil A. Boulerice
William L. Foote
Dealer

By

B.

ESSO STANDARD OIL COMPANY

ESSO

135 Clarendon Street . Boston 17, Mass.

Sales Department
New England Division
B. F. Shea - Manager
H. D. Harding - Asst. Manager

FAIR TRADE NOTICE

To All Esso Dealers in Massachusetts

Effective August 8, 1956, we are establishing under the provisions of the Massachusetts Fair Trade Act, stipulated minimum retail prices for our motor fuels.

The motor fuel products made subject to Fair Trade and the stipulated minimum retail prices are:

Esso 20.9¢ per gallon plus Federal and State Taxes
Esso Extra 23.9¢ per gallon plus Federal and State Taxes
Golden Esso Extra
26.9¢ per gallon plus Federal and State Taxes

The Massachusetts Fair Trade Act makes these stipulated minimum retail prices binding on all retail sales of Esso Motor Fuel, Esso Extra Motor Fuel and Golden Esso Extra Motor Fuel, whether or not the retailer has signed our Fair Trade Agreement.

The provisions of our Fair Trade Agreement, which has been entered into in Massachusetts, are printed on the back of this notice.

The existing difference between these minimum retail prices and the prices at which you purchase these motor fuels may in the future change, and we do not make any representation with regard to the continuance of this existing difference.

Very truly yours,
B F SHEA
Division Manager

C.

Esso Standard Oil Company

ESSO

135 Clarendon Street . Boston 17, Mass.

Sales Department
New England Division
B. F. Shea - Manager
H. D. Harding - Asst. Manager

Registered Mail
Return Receipt Requested

September 11, 1956

Secatore's Inc.
63 Maverick Square
East Boston, Massachusetts

Attention: Mr. Franklin Secatore

Gentlemen:

On August 7, 1956, we mailed to you a copy of our Fair Trade notice which sets forth stipulated minimum retail prices for Esso, Esso Extra and Golden Esso Extra gasolines effective August 8, 1956, under the Fair Trade Act of the State of Massachusetts, and which also sets forth the provisions of our Fair Trade Agreement.

We enclose herewith an identical copy of that notice.

We have information that you are selling Esso and Esso Extra gasolines at prices below our stipulated minimum retail prices. Unless you immediately raise your prices to or above those minimum prices we will take the necessary steps to enforce our rights under the Fair Trade Act.

Very truly yours,

Original Signed
B. F. Shea

Enc.
BFS:K

cc-Mr. R. E. Keresey—Esso Bldg.
Mr. W. G. Guernsey—Ely Bartlett, Thompson & Brown
Mr. R. H. DeHart

Motion for Preliminary Injunction.

Now comes the plaintiff in the above-entitled cause and moves that a preliminary injunction be issued in accordance with Prayer No. 1 of the plaintiff's bill of complaint.

By its attorneys,

ELY, BARTLETT, THOMPSON & BROWN

By: CHARLES W. BARTLETT

294 Washington Street

Boston 8, Massachusetts

The above motion will be heard on Thursday, Sept 20, 1956, at 9.30 o'clock A.M. before Wyzanski D. J., in Court Room 6, 15th floor, Federal Building, Boston, Massachusetts.

Answer.*

[Filed September 27, 1956.]

To the Honorable the Judges of the United States District Court in and for the District of Massachusetts:

Now comes the Defendant in the above entitled case and answers the Plaintiff's Complaint as follows:

FIRST DEFENSE

Plaintiff entered into a written agreement with the defendant prior to the date alleged in Paragraph 8 of the complaint, a copy of which is attached hereto and made a part hereof and marked Exhibit 1. That said agreement is still in full force and effect and because of said agreement, the plaintiff cannot enforce its Fair Trade Agreements against the Defendant.

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*See Amendment to Answer, *infra*, pp. A73-A74.

Second Defense

The Plaintiff does not merit the relief that it seeks against the defendant because of its conduct in its sales of its Branded products, namely "Esso" and "Esso Extra" to its commercial accounts.

Third Defense

The Plaintiff's Fair Trade Agreements are unlawful and cannot be enforced against the Defendant because an area of direct competition exists between the Plaintiff and Defendant, in the same Trading area, in the sale of Plaintiff's branded products "Esso" and "Esso Extra".

Fourth Defense

Defendant admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 10, 12, 16, 17, and denies the allegations contained in Paragraphs 7, 11, 12, 13, 14, and 15. The Defendant admits that the Plaintiff notified the Defendant of its Fair Trade Agreements as alleged in Paragraph 8, but denies that said agreements were binding on all retail dealers of "Esso" and "Esso Extra" motor fuels. The Defendant admits that it sold "Esso" and "Esso Extra" as alleged in Paragraph 9, but denies that such sales were in violation of the Massachusetts Fair Trade Act.

Wherefore the Defendant respectfully requests that Plaintiff's complaint be dismissed and that the Defendant be awarded its costs and attorney's fees.

SECATORE'S, INC.
By its attorney,
Albert U. Rosa
Albert U. Rosa
18 Meridian Street
East Boston, Massachusetts

1.

[Admitted in evidence as Defendant's Exhibit 1, p. 32.]

ESSO

MOTOR FUEL SALES CONTRACT

AGREEMENT made this 29th day of September, 1953, between Esso STANDARD OIL COMPANY, a Delaware corporation, hereinafter called "SELLER" and SECATORE'S, INC. of 63 Maverick Square, East Boston, Massachusetts, hereinafter called "BUYER,"

WITNESSETH:

1. Seller agrees to sell and deliver by tank wagon to Buyer at 396 Chelsea St., E. Boston, Mass., and 295 Waldemar Ave., E. Boston, Mass. and Buyer agrees to purchase and receive from Seller, Buyer's requirements of Esso and Esso EXTRA at the prices and upon the terms herein contained. Esso and Esso EXTRA shall be divided between these products in accordance with Buyer's demands.

2. For Esso and Esso EXTRA delivered hereunder, Buyer shall pay to Seller an amount per gallon which shall be Seller's posted dealer tank wagon price for Esso and Esso EXTRA, respectively, in effect at the time and place from which delivery is made, applicable to the area in which Buyer's premises are located.

3. It is agreed that any duty, tax, fee, or other charge now in effect or hereafter enacted which Seller may be required to collect or pay with respect to the production, manufacture, transportation, sale, delivery or use of the commodities covered hereby shall be added to the above prices and paid by Buyer.

4. Buyer shall pay for all products delivered hereunder in cash at the time of delivery, unless Seller shall extend credit to Buyer, provided, however, that if credit is so extended, and at any time thereafter Buyer's financial responsibility shall become impaired or unsatisfactory to Seller, advance cash payment or satisfactory security shall

be made or given by Buyer on demand by Seller and Seller may withhold further deliveries until such payment or security is received.

5. All orders shall be filled with reasonable promptness by Seller except that in the case of fire, riots, strikes or accidents or any other conditions whether or not similar in character to those specifically named, which unavoidably delay or stop Seller from making deliveries, deliveries hereunder may be cancelled or partially cancelled as the case may require without liability to Seller. Seller shall not be held responsible for any losses resulting if the fulfillment of any of the terms or provisions hereof shall be delayed or prevented by reason of compliance by Seller with any order or request of any governmental authority or person purporting to act therefor. Any such interruptions of deliveries, however, shall not invalidate the remainder of this agreement, but upon removal of the cause of the interruption deliveries shall be continued as before.

6. No waiver by either party of any breach of any of the covenants or conditions herein contained to be performed by the other party, shall be construed as a waiver of any succeeding breach of the same or any other covenant or condition.

7. This agreement shall be effective from and after the 1st day of May, 1954, and shall continue in effect for Three (3) years thereafter, and after such period from year to year until one party shall have given thirty (30) days' written notice to the other party of intention to terminate this agreement on the expiration of the then current period. Such notice may be given during the first period to be effective at the end thereof or during any subsequent year to be effective at the end of the then current year.

8. This agreement cancels and supersedes any prior agreement between the parties hereto covering the purchase and sale of ESSOLENE, Esso or Esso EXTRA.

9. There is no understanding or agreement, express or implied, on any of the subjects referred to in this agreement other than those specifically stated herein. This agreement is not assignable or transferable by Buyer directly or indirectly without the written consent of Seller. No claims shall be made hereunder for indirect or consequential damages.

10. Buyer agrees in handling gasoline treated with tetraethyl lead anti-knock compound sold hereunder to comply with Series III of the Regulations of the Surgeon General of the United States Public Health Service relating to "The Distribution of Ethyl Gasoline."

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

SECATORE'S, INC.
By Franklin Secatore
Buyer

Witness:
A. Lopez

Witness:
A. M Coughlin

ESSO STANDARD OIL COMPANY
(Seller)
By H. D. Harding
Manager

Hearing before Wyzanski, J.

[September 20, 1956.]

[2] The COURT. I have before me a complaint and a request for a temporary injunction or restraining order. I have no other pleading. Is there any other pleading that anybody—

The CLERK. Just the motion for preliminary injunction.

The COURT. Is there opposition to the motion which is attached to the complaint?

Mr. ROSA. Yes, there is, your Honor.

The COURT. Would you tell me what I probably ought to know, your name and who you represent?

Mr. ROSA. My name is Albert U. Rosa and I represent the defendant, Secatore's, Inc.

The COURT. Thank you. Is there anybody else formally interested in this beyond the plaintiff represented by Mr. Bartlett and his associates, and the defendant represented by Mr. Rosa? [No response.]

Before any other statement is made would you tell me, Mr. Rosa, on what general grounds you are going to oppose the motion?

Mr. ROSA. Yes, sir, I would be glad to, your Honor. We are going to oppose the motion, if your Honor pleases, on three grounds, the first of which is the fact that the defendant has a valid existing contract with the plaintiff whereby the plaintiff agreed to sell the defendant gasoline and the defendant [3] to buy gasoline, and that antedates the fair trade contract as alleged in the petition by more than two years, expiring next May. That is the first basis.

The second basis, if your Honor pleases, is that the plaintiff, in the conduct of its business, sells at the wholesale level and also sells directly to consumers through its commercial accounts and that, in selling to consumers, that in the same trading area in which the defendant does business, on the one hand it asks the defendant to sell gasoline at 28.9 cents per gallon and it, in turn, sells gasoline to consumers directly at 24.1 cents per gallon.

[4] And the third ground is the fact that the plaintiff has tolerated and condoned the giving of stamps.

Those are the three grounds, if your Honor please.

The COURT. That is a very clear statement, and it is certainly very helpful. Perhaps there is a large measure

of agreement as to certain facts, and it might be worth while if Mr. Bartlett began by trying to elicit from you a stipulation as to certain facts, about which perhaps there is no dispute.

Mr. BARTLETT. Your Honor, may I introduce Mr. Richard E. Keresey of the New York bar?

The COURT. I am very glad to know you.

Mr. BARTLETT. I will take the plaintiff's bill of complaint. The first allegation is that Esso Standard Oil Company is a corporation organized under the laws of the State of Delaware, authorized to do business in the Commonwealth. And I will ask Mr. Rosa if he would admit that?

Mr. ROSA. I do.

Mr. BARTLETT. The second one is that the plaintiff for many years has been and is now engaged in refining and distributing in Massachusetts and elsewhere various petroleum products including motor fuels.

Mr. ROSA. I do admit it.

Mr. BARTLETT. Third, the plaintiff has long marketed motor fuels known as "Esso" and "Esso Extra", which are trademarks, brands and names owned by the plaintiff.

[5] Mr. ROSA. I do admit it.

Mr. BARTLETT. Number 4, the defendant Secatore's, Inc., a Massachusetts corporation, is doing business at 295 Waldemar Avenue and Day Square, East Boston, and is engaged in the sale, at retail, of motor fuels and other petroleum products, including the plaintiff's motor fuels "Esso" and "Esso Extra",—it says at said service station, but it should be plural, service stations, because there are two of them.

Mr. ROSA. That is admitted.

Mr. BARTLETT. Number 5, the motor fuels that the plaintiff distributes, "Esso" and "Esso Extra", are dis-

pensed from vending equipment bearing the plaintiff's trademarks, in fair and open competition in the Commonwealth of Massachusetts with products of the same general class which are produced and distributed by others.

Mr. ROSA. That is admitted, if your Honor please.

Mr. BARTLETT. Number 6, that the plaintiff has expended, and is now spending, large sums of money in promoting and advertising its "Esso" and "Esso Extra" motor fuels, and over many years has established and is maintaining a valuable reputation and goodwill in its name for said motor fuels and for the trademarks, brands and names under which they are produced and sold.

Mr. ROSA. That is admitted.

Mr. BARTLETT. Number 7, acting pursuant to the [6] authority of General Laws, Chapter 93, Section 14A through 14C inclusive—that is the Massachusetts Fair Trade Act—the plaintiff entered into, and there are now in effect, with retail motor fuel dealers in the Commonwealth, agreements under and by which the plaintiff has established minimum retail prices for its trademarked, branded and named motor fuels, "Esso" and "Esso Extra". A copy of one of those, your Honor, is annexed to the bill of complaint, and I am in a position to prove three others.

The COURT. Now, the first question is whether Mr. Rosa admits the allegations of paragraph 7, including what is called Exhibit A.

Mr. ROSA. I do.

The COURT. And let's now take the other examples that you have, Mr. Bartlett, and see whether you can get agreement with respect to the other examples.

Mr. BARTLETT. There is a contract headed "Fair Trade Agreement", on the same printed form as Exhibit —I am being corrected (conferring with associate). I am sorry. There is a contract dated August 7, 1956, with all

the same content with the exception of names as Exhibit A. This is between Esso Standard Oil Company and Nick Sena & Son, Nicholas and Gabriel N. Sena, Proprietors, 502 Riverside Avenue, Medford, Mass.

[7] There is a further contract—further and similar contract—dated August 8th, 1956 between Esso Standard Oil Company and Melrose Community Garage, Austin C. Wheeler, Proprietor, 203 Essex Street, Melrose, Massachusetts.

The COURT. Are those the two contracts to which you referred?

Mr. BARTLETT. I have one more, your Honor.

The COURT. Excuse me. I beg your pardon.

Mr. BARTLETT. There is one further one dated August 8, 1956, similar content, between Esso Standard Oil Company and Roland E. Tranique, Electric Avenue, Lunenberg, Massachusetts. I will be glad to show those to Mr. Rosa.

The COURT. I think you better show them.

[Mr. Bartlett hands papers to Mr. Rosa.]

The COURT. For the purposes of this hearing, Mr. Rosa, do you agree that these may be used?

Mr. ROSA. Yes.

The COURT. Contrary to the usual practice I think it would be better in this case if we numbered the plaintiff's exhibits exactly as he has done, by letters instead of by numbers, and let us call these additional exhibits A-2, A-3, and A-4, and change the Exhibit A as offered in the complaint to A-1.

Mr. BARTLETT. All right, your Honor. I haven't shown Mr. Rosa the original—[handing to Mr. Rosa].

[8] [Plaintiff's Exhibit A changed to Plaintiff's Exhibit A-1;

Fair Trade Agreement with Sena and Son marked Plaintiff's Exhibit A-2;

Fair Trade Agreement with Roland A. Tranique marked Plaintiff's Exhibit A-3;

Fair Trade Agreement with Melrose Community Garage marked Plaintiff's Exhibit A-4.]

Mr. BARTLETT. I should state for the record, your Honor, that the minimum fair trade prices set in those contracts are all the same.

The COURT. I have now admitted, for the purposes of this hearing, four exhibits. An agreement has so far been reached on the first seven paragraphs of the complaint. Will you now proceed with the next paragraph?

Mr. BARTLETT. Yes, your Honor. [Reading]:

"On August 7, 1956, the Plaintiff notified the Defendant of its Fair Trade Agreements aforesaid, of the stipulated minimum retail prices provided thereunder for the Plaintiff's said motor [9] fuels 'Esso' and 'Esso Extra', effective August 8, 1956, of 20.9 cents per gallon and 23.9 cents per gallon respectively, exclusive of Federal and State taxes,—"

and I go on, which is in the form of perhaps a conclusion:

"and pursuant to the provisions of Massachusetts Fair Trade Act, said stipulated minimum retail prices were binding on all retail sales of 'Esso' and 'Esso Extra'—"

Perhaps I should strike that out. That is for your Honor.

The COURT. In any event it is nothing as to which you could hope to get an agreement from the other side.

Mr. BARTLETT. No. But there is annexed to the bill a copy of the original notice of the 7th.

The COURT. The question really is whether Mr. Rosa will agree to the five and one-half lines at the beginning of Paragraph 8 ending with the words "Federal and State taxes". And would also agree, for the purposes of this hearing, with the correctness of what is said in the second and final sentence of Paragraph 8.

Mr. ROSA. I do, your Honor.

The COURT. Thank you.

Mr. BARTLETT. I will try to paraphrase 9. I might as well go the whole hog, your Honor—

The COURT. Except the last.

[10] Mr. BARTLETT. I might ask him whether or not on September 11, his client, Secatore's, Inc., was advertising and offering for sale and selling at retail from pumps bearing the plaintiff's trademarks, brands and names "Esso" and "Esso Extra" at prices lower than the minimum retail prices provided for in Exhibits A-1 through A-4 and eliminate the last part of the sentence, "in violation of the Massachusetts Fair Trade Act."

Mr. ROSA. The answer to that, if your Honor pleases, is Yes. We were selling below the posted prices in the agreement.

The COURT. Thank you.

Mr. BARTLETT. To a large extent that eliminates the necessity of No. 10, your Honor, except for complete proof. I think I would like to have in a copy of the letter that we mailed Mr. Secatore on that day.

The COURT. Do you agree, Mr. Rosa, that the letter, which is Exhibit C attached to the complaint, was received by your client?

Mr. ROSA. I do, your Honor.

The COURT. Thank you.

Mr. BARTLETT. That eliminates, your Honor, No. 11 except perhaps as a matter of proof it would call for an admission, if he cares to make it, that on September 12,

Secatore's, Inc. was also selling below the minimum prices.

[11] The COURT. That is just another day?

Mr. BARTLETT. Yes, your Honor.

The COURT. Do you agree that on September 12 the sales were also below the figures set forth in Exhibits A-1 to A-4, inclusive?

Mr. ROSA. I do.

The COURT. Thank you.

Mr. BARTLETT. No. 12, your Honor, for proof would seem merely to call for an admission, if he cares to make it, that on those two days, September 11th and 12th, the minimum price was the same as it had been on August 8th when it went into effect.

The COURT. You mean there was no change on your part?

Mr. BARTLETT. No change, your Honor.

The COURT. Do you agree to that?

Mr. ROSA. I do.

The COURT. Thank you.

Mr. BARTLETT. Well, No. 13 is something of a conclusion, your Honor. I am prepared to put on evidence as to that. It merely says that by reason of Mr. Secatore's cutting prices this will, if permitted, that fact will induce other dealers in the Commonwealth to follow him.

The COURT. For purposes of this hearing do you admit that?

Mr. ROSA. I am not inclined to admit that, your Honor.

[12] Mr. BARTLETT. No. 14 is another conclusion and perhaps, Mr. Rosa, I can shorten that up by asking you if you want me to prove that or admit it, No. 14.

Mr. ROSA. I do not believe that I can admit that, if your Honor pleases.

Mr. BARTLETT. All right. I am just assuming, your Honor, to shorten things up, that Mr. Rosa will take the same position as to No. 13.

The COURT. You want that proved, Mr. Rosa, don't you?

Mr. ROSA. Yes, I do.

The COURT. Thank you.

Mr. BARTLETT. And I will assume that is true on jurisdictional limit of $3,000, which is No. 16.

The COURT. What about that?

Mr. ROSA. Oh, I don't dispute the jurisdictional amount.

The COURT. There is no dispute as to the jurisdictional limit, and perhaps for the purposes of the record, in the event of an appeal, you had better say how you arrived, Mr. Bartlett, at the figure that the amount in controversy exceeds $3,000.

Mr. BARTLETT. Yes, I will do it right now. I tie this in with your opinion in the Eastman Kodak case, your Honor. In that case, as I recall it, you stated on a showing of $1,000,000 worth of business in the Commonwealth per annum [13] you were warranted in concluding that the controversy could be over $3,000.

The COURT. Does Esso Standard Oil Company do over $1,000,000 worth of business in the Commonwealth of Massachusetts?

Mr. BARTLETT. I believe it is $32,211,000, approximately.

The COURT. All right. And you would be prepared to show it?

Mr. BARTLETT. Yes, your Honor.

And then I maintain that we are without adequate remedy at law. I will not call for an agreement on that.

Now, in order to support the paragraphs on which there has been no agreement, I would like to call Mr. Harding, your Honor.

[14] HAROLD D. HARDING, *Sworn*

Direct Examination by Mr. Bartlett

Q. May I have your full name, Mr. Harding? A. Harold Duncan Harding.

Q. And where do you live? A. 159 Tower Avenue, Needham.

Q. And what is your business? A. I am assistant division manager for the Esso Standard Oil Company in New England.

Q. And the division that you refer to covers what territory? A. It covers the New England States, Maine through Connecticut.

Q. And your principal office is located where in Boston? A. Clarendon Street in Boston, No. 135.

Q. How long have you been employed by Esso Standard Oil Company? A. I started on September 13, 1929; that would be 27 years.

Q. And how long have you been assistant division manager? A. About a year.

Q. And prior to that time what was your job? A. I was New England Operations Manager, and prior to that district manager in the State of Massachusetts.

Q. Just to go back, when did you start being district manager in the State of Massachusetts? A. Well, that is about 1951, I believe it was.

Q. Now, in your present job, and in the job that you have had in the past with Esso Standard Oil Company in this division and [15] in Massachusetts, have you had experience in the matter of the marketing, the pricing, of gasolines, the supervision of retail outlets, the effect of competition between outlets, and in the effort of sale of gasoline generally? A. I believe I do.

Q. Let's go back a little bit more just for a second. At any time during your career with the Esso Standard Oil

Company, have you had under your immediate control a certain limited number of stations? A. Yes, I have, sir. I have been a salesman with a specific area to handle, a sales supervisor, assistant district manager, district manager, all of which comprises supervision or direction of a group of stations.

Q. On or about August 8, 1956, did you take part in the mechanics of placing this division of Esso on a fair trade basis? A. I did.

Q. And did that consist of forwarding to the dealers in Massachusetts a notice similar to the one sent on August 7th to Secatore's, Inc.? A. That is correct, yes, sir.

Q. How many dealers? A. 984 in the Commonwealth of Massachusetts.

Q. Now, are these retail outlets? A. Yes, sir.

[16] Q. 984? A. 984.

Q. And thereafter did you have anything to do with the mechanics of the follow-up of that notice? A. Yes, sir, I did.

Mr. BARTLETT. I am leading a little bit, your Honor.

The COURT. I think tha is all right for now.

Q. And what was the follow-up? We will take the immediate follow-up after the notice. A. Well, a letter of notification to the dealer—

Q. Maybe you missed my question, Mr. Harding. As I understood it, the letter of notification has gone out to all of these 800-odd dealers. What was the next step? A. Then we sent a letter to the dealer indicating that we had evidence that he was not complying with the fair trade statute.

Q. Now, let's go back, Mr. Harding.

Mr. BARTLETT. And I will lead a little bit.

Q. After the notice on the 7th of August had gone out, was a check made on the dealers in the Commonwealth as to whether or not they were complying? A. Yes, sir.

Q. And it was made by whom? A. Made by the general salesmen in the area, in which they cover, primarily.

Q. And that was made within how many hours or days? [17] A. We started checking immediately. After the fair trade law went into effect, or when we put our products on fair trade, we immediately started to check.

Q. Can you help me a little more and tell me how long it took to cover the 800?

The COURT. 900.

The WITNESS. 984. Well, I would say in a matter of two days, probably, the entire area was covered.

Q. And then after that, in the instance of evidence of non-compliance by a dealer, what was the next step in your mechanics? A. Then we sent that letter I probably referred to, advising the dealer that we had evidence to the effect he was not complying with the fair trade price. Further than that, a personal contact, of course, was made with the dealer by the salesman.

Q. And after that, if there was non-compliance? A. Then it was followed up by a contact either by the assistant district manager or the district manager.

Q. And after that, if there was non-compliance? A. After that, the proper papers were processed.

The COURT. That doesn't help me much, because I don't know what the proper papers are. What was done?

The WITNESS. It was turned over to our legal department for handling.

Q. Now, covering the State of Massachusetts, with how many dealers has there been non-compliance? [18] A. I believe that there were three cases in Massachusetts of non-compliance.

Q. You have a list, don't you, somewhere around here? A. I have a list in my brief case, yes.

Q. Will you get it, please? A. [Complying] Do you want the names of the dealers?

Q. No, just how many non-compliance cases have there been? And I don't refer to cases in court; I mean instances of non-compliance. How many dealers?

The COURT. I don't understand the question, and perhaps Mr. Harding does not understand the question. Does that mean how many cases where the assistant district manager or district manager remonstrated with the dealer?

Q. How many dealers didn't come up in price?

The COURT. At once, or after discussion?

The WITNESS. Well, maybe this is what you are asking, Mr. Bartlett. When we went into the fair trade, there was a period that—you see, we checked it within two days, we covered the area. Now, there were some dealers that were not complying at the end of the second day. I would say probably in all there might be 12 or 14 dealers in the State that were not complying at the end of the second day.

Q. Right. A. We then proceeded to send them this letter.

Q. Yes? [19] A. Pointing out that they were not complying with the fair trade law. And on receipt of that letter, which we sent registered mail return receipt, every case but three in the State complied, went up to the fair trade price.

Q. Now, have actions been brought in this court in any of those instances? A. No, we—the legal department, as you know—

The COURT. No. The answer is, so far as you know, none?

The WITNESS. Not into court.

Q. If I were to tell you that the records of this court will show two cases, would you say I was wrong? A. Well, maybe I am misinterpreting the judge. What I thought he meant was whether or not they had appeared in court. There are three cases—and again maybe my terminology isn't correct, but papers were served.

A. In two instances? A. In two instances.

The COURT. In addition to this one?.

The WITNESS. That is right.

Q. And subsequent to the serving of papers, do you know whether those particular dealers complied? A. The dealers are now, and did go up to the fair trade prices.

Q. And as of the present day, with the exception of Secatore's Inc., do you know of any non-compliance in the Commonwealth? [20] A. No, sir, I do not.

Q. Now, from your experience, Mr. Harding, thus far with the Massachusetts Fair Trade Act, and from your background of experience with the Esso Standard Oil Company, is it or is it not your opinion that continued violation by the defendant Secatore will cause and induce other retail gasoline dealers in the Commonwealth to sell below fair trade prices?

Mr. ROSA. I object.

The COURT. Isn't he qualified to give an opinion? Isn't he an expert with respect to this general problem of marketing?

Mr. ROSA. I think he is, as far as that is concerned, but if my brother includes in that question, and predicates part of it on the Massachusetts Fair Trade Act, then I don't think he is qualified to give an opinion on that basis.

The COURT. I think the question may be restated without running into that objection.

Q. From your experience and background as an employee and executive of Esso Standard Oil in Massachusetts over the years, is it or is it not your opinion that if the defendant in this case continues to sell at prices lower than the minimum price referred to in the exhibits, and now in evidence, that fact will cause and induce other retail gasoline dealers in the Commonwealth to come down in their prices? A. That is correct.

[21] Q. Below the prices I have referred to? A. That is correct.

Q. Now, could you tell his Honor the effect on Esso Standard Oil Company of continued selling below the prices referred to, the effect on its business and pricing structure? A. Why, I think there would be two major effects. First of all, it would, without any question, injure our trademark in the Commonwealth of Massachusetts. People are used to quality products under the Esso sign, and it certainly would have a very poor effect in that respect. Secondly, without any question, it would demoralize our distribution pattern.

Q. Would you have an opinion as to whether it would or would not cause loss of sales? A. There is no question but it would affect sales.

The COURT. That wasn't really the question that was put to you. The question is, would it cause loss of sales. You say it would affect sales.

The WITNESS. I will say it would affect them adversely, then. Yes, it would cause loss of sales.

Q. Would you say that it would have—and maybe you have already said this—but would you say that it would have an immediate and substantial effect on the goodwill of the Esso Standard Oil Company and the value of its brand name products? A. Yes.

[22] Q. Would or would not that be damaging? A. It would certainly injure the Esso trademark.

Mr. BARTLETT. May I have just a minute, your Honor?

The COURT. Yes.

[Mr. Bartlett confers with associate.]

Mr. BARTLETT. One thing I might bring out here for clarity, your Honor.

Q. I note, Mr. Harding, that these prices as set forth in the agreements are, what? Twenty? A. 20.9.

Q. 20.9 for Esso, and 23 what? A. 23.9, 26.9—20.9 for Esso, 23.9 for Esso Extra, and 26.9 for Golden Esso Extra.

Mr. BARTLETT. The Golden may go out, your Honor, because it is not in issue in this case.

The COURT. All right.

Q. Now, in addition to that there is referred to in the plaintiff's bill Massachusetts and federal taxes, what do they amount to? A. The total tax in the State of Massachusetts is eight cents, five and three, five cents State and three cents Federal.

Q. So you add—? A. You have to add eight cents to the price I quoted, so 20.9 would be 28.9.

Mr. BARTLETT. I believe that is all, Mr. Rosa; you may examine.

[23] *Cross-examination by Mr. Rosa*

XQ. Now, Mr. Harding, in 1953 you were a manager in the Boston office? A. No. In 1953 I was district manager at Everett covering the Massachusetts district.

Mr. BARTLETT. Mr. Rosa, if you would like to put in the contract, could I take a look for just a minute? [Brief pause.] This, I believe, is on Mr. Rosa's first point that he mentioned. I will be glad to have him introduce the contract.

The COURT. There being no objection it may as well be marked in evidence as Exhibit 1 for the defendant and could you just state, so that the court reporter and I have it, a description of what that document is?

Mr. ROSA. This is an agreement dated September 29, 1953, by and between Esso Standard Oil Company and Secatore's, Inc. whereby—

The COURT. You don't have to tell me any more than that at this stage but you may use it for any questioning, if you wish.

[Agreement dated September 29, 1953, between Esso and Secatore's, Inc. marked Defendant's Exhibit 1.]

XQ. Now, you are familiar with commercial accounts as conducted and operated by the Esso Company? A. I should say I am, yes, sir.

XQ. Will you tell the Court what commercial accounts are? [24] A. A commercial account—I would like to put it this way: We have two types of accounts, dealer and commercial. A commercial account is a trucking account primarily who purchases from us in tank truck deliveries for their own consumption.

XQ. In other words, they are sales made by the Esso Company directly to consumers? A. To a commercial consumer, that is correct.

XQ. And how many, approximately, commercial accounts does the company have?

The COURT. Where?

Mr. ROSA. In greater Boston.

A. Well, I haven't—we have got 344 commercial accounts in the state of Massachusetts. I can't tell you specifically the amount in greater Boston at this time. I can look it up and give it to you, if you want it.

XQ. And at what price is the gasoline sold to the commercial accounts? A. They vary depending upon volume. The price varies to commercial accounts depending upon volume.

XQ. And by that you mean the greater the volume the smaller the price? A. That is correct.

XQ. Well, take a 500-gallon lot, for example. At what price does the company sell directly to the consumers? A.

The price is not based primarily on the volume in any one [25] individual delivery. The price is based upon the volume consumed by the account in a period of one year. The price, specifically up to 100,000 gallons a year, is the commercial tankwagon price which in effect is one-half cent a gallon higher than the posted dealer tankwagon price.

XQ. Do you mean to tell us that if a person consumes or buys 100,000 gallons of gasoline per year—

The COURT. Or less.

A. Or less.

XQ. —or less, it is sold to the consumer at one-half cent a gallon higher than the dealer buys it; is that right? A. That is correct. There are three limitations to it, that we make no bulk deliveries under 100 gallons, so the account, number one, has to buy in excess of 100 gallons. Single deliveries of less than 300 gallons, the net contract price will be plus one cent a gallon. Single deliveries of 300 gallons and over but less than 600 gallons it is one-half cent a gallon higher because of the size of delivery. Then from that point up it follows the formula.

XQ. Can you tell us how much less the delivery price is to the commercial account than the posted price as you say under the Fair Trade?

The COURT. Than the posted price, not the dealer price?

Mr. ROSA. The posted price.

A. Well, as I said at the start, prices vary. If you have [26] some—

XQ. Let's take the 100-gallon lot, delivery of 100 gallons. A. Well, let me do some figuring. The fair trade price is 28.9. 8 cents for tax, so it is 20.9. Now, 15.5 is the dealer price in Massachusetts; that is exclusive of tax. The commercial consumer buying today, the commercial tankwagon price is one-half cent higher than that. There-

fore it is 16.1. So a commercial consumer buying up to 100,000 gallons of gas but in excess of 600 gallons in any one delivery would be paying 16.1 cents exclusive of tax for the product. I think I am right in that.

XQ. And including taxes it would be 24.1? A. 24.1, including taxes.

XQ. So that would be approximately 4.8 cents per gallon less than dealers are required to sell it under your fair trade arrangement; is that right? A. That's the difference between the retail posting and the fair trade which is 28.9, including tax versus the price to the commercial consumer up to 100,000, is 4.8 cents.

XQ. Now, you have told us that that is delivered to the consumer. A. Correct.

XQ. And I think you told us that the price you just quoted us is for deliveries in excess of 600 gallons? A. That is right.

[27] XQ. Now, is it the practice of the Esso Company to install the tank and pump in the commercial accounts? A. We do in many cases, yes.

XQ. And so that if I had three automobiles or two or three trucks I could call Esso Company, the commercial division, and they would come in and put in a tank and pump and I could buy gasoline at the prices you have told us? A. Not necessarily, sir. We would put in a pump only if we could show a profit on delivery. We don't take business without making a profit.

XQ. You told us a few minutes ago, did you not, that there is no floor or minimum to the amount of gasoline that a commercial account purchases? A. I told you that there was a scale on a different price and the figure I used, from zero to 100,000 gallons, was a range in which we determine the price. Actually, of course, we wouldn't be taking an account that didn't give us sufficient volume and size of delivery commensurate with a good profit.

XQ. Let me ask you this question, if I may: What, in your opinion, based on your experience, would be a minimum volume necessary before you would install a tank? A. I would have to see specific figures as to the cost of installation, the amount of equipment required, the volume of business, the distance from the plant.

XQ. Well, assuming that I called the Esso Company and said [28] that my monthly consumption is 500 gallons or 1,000 gallons a month— A. We wouldn't be interested, sir.

XQ. You wouldn't be interested? A. No, sir.

XQ. Well, then, you do have a minimum amount of volume before you do become interested; is that right? A. Sure. Where we won't make a profit. That is the minimum.

XQ. You have told us that you won't sell at 24.1 unless the delivery exceeds 600 gallons; is that right? A. No, I didn't.

The COURT. You don't want, really, to say 24.1; you want to say 16.1.

Mr. ROSA. 16.1 plus 8 cents taxes.

A. [continued] I didn't say that. I said that we would sell but if the delivery was less than 100 gallons we wouldn't make it. If the single delivery was 300 gallons then we would charge an extra cent because that volume was so small, in the delivery. If the delivery was between 300 and 600 gallons, we charged one-half cent extra because the size of delivery was so small, but anything in excess of 600 gallons we charge the commercial tankwagon price, if it was delivered to a commercial account.

XQ. Would you be familiar with the account of A. S. Campbell Company in East Boston? [29] A. Yes, sir.

XQ. Do you have any records there to help the Court as to the amount of gasoline they use in the course of a month or a year? A. I think I probably could find out

in a few minutes. [Examining documents.] Yes, I have the figures here for 1955 and for the first seven months of this year.

XQ. And that company is in the defendant's trading area? A. That's right.

XQ. How much gasoline was sold to the A. S. Campbell Company in 1955? A. 7,411 gallons.

XQ. And the A. S. Campbell Company is a direct consumer of the gasoline; that is right, isn't it? A. It is a commercial consumer, that's right.

XQ. Now, you told us that there are 984 retail outlets in Massachusetts. A. That's right.

XQ. Selling Esso gasoline? A. That's right.

XQ. How many of those, if any, did the company operate directly? A. We do not operate any stations direct.

XQ. Does the company own any of those stations? A. Yes, we own.

XQ. How many? A. Well, the combination of owned —I have got different types [30] of ownership. We have stations where we own the land and the building; we have stations where we own the building only on leased land; and we have stations where we have long term lease commitments. There are a total, in the three categories, of 344 in the state of Massachusetts.

XQ. So that the company either owns or controls— A. We do not control, we have owns or lease.

XQ. You control by lease, do you not? A. Yes, we have a lease arrangement—

Mr. BARTLETT. I object, your Honor.

The COURT. It is necessary to decide that matter, and I am quite content with the phraseology used by the witness, unless shown to me some other more specific term— owns or leases 344 stations.

XQ. When you say "lease" do you mean that the company leases these stations from the owner of the gas sta-

tion? A. We have—no. The basic lease that we have is a land lease or a completed station lease with the property owner and we in turn then sublease that location. We call it a three-party arrangement.

XQ. And when you sublease, the sublessees pay you rent, I assume? A. That's right.

XQ. How? A. How?

XQ. How is that determined? [31] A. Determined upon the carrying charges of the station.

XQ. Is that on a gallonage basis? A. We have it a number of ways. We have it on gallonage, we have it on flat, and we have it on incentive.

The COURT. Gallonage, flat and incentive, did you say?

The WITNESS. That's right, sir.

XQ. Can you tell us of the 384 stations how many are on a gallonage basis? A. I cannot, sir. I haven't got the figure with me.

Mr. BARTLETT. Your Honor, just to clarify the issues I wonder if Mr. Rosa would state the point that he has in mind. The matter of what the other dealers may pay for rent and so forth, and I do not see that it is pertinent to the matter of fair trading of gas. There is no question that all of the other stations in the Commonwealth are selling at this price. What they pay seems foreign to our present investigation.

Mr. ROSA. Well, if your Honor please, I propose, through this line of questioning, to show that the plaintiff has a direct interest in these retail sales outlets.

The COURT. And, if so, what?

Mr. ROSA. And, if so, it is horizontal price fixing as well as vertical.

The COURT. I am afraid I don't fully grasp the legal significance of those words, horizontal and vertical, in this sense.

[32] Mr. ROSA. By that I mean, if your Honor please, that they have a direct interest, financial and otherwise, in these retail outlets; that their rentals are paid to them on the basis of how much gasoline is sold, and they control these stations and therefore they are almost in the same category as retail.

The COURT. If in the point of view of the consumer the price charged is the same regardless of whether the outlet is a thoroughly independent outlet or is a lessee or is, if you please, a partner of the plaintiff, how could that make any difference under this statute, assuming that the consumer is given, in each case, the same price?

Mr. ROSA. Then, if your Honor pleases, this is a situation where retailers are getting together, where the plaintiff has an interest in the retail end of the fixing of prices.

The COURT. All this may be relevant to some other situation but I am asking what had it to do with the fair trade act? Is there anything which bears upon the fair trade act in this situation?

Mr. ROSA. The plaintiff here in both the fair trade has an interest in the retail sales.

The COURT. I am sorry but I really don't grasp your point. Would you amplify it a little?

Mr. ROSA. We start with a premise, if your Honor pleases, that price fixing between retailers is prohibited [33] and if the plaintiff in this case either owns or controls a substantial number of these retail outlets, then I submit, if your Honor pleases, that even though it may be a producer, even though it may be a wholesaler, it also has a direct interest in the retailing of this gasoline and therefore any price fixing arrangement being made by it in its capacity as a producer conflicts with its interest as a retailer.

The COURT. May I put you a hypothetical case under the Fair Trade Practice Act and see if I understand your

contention. I am not at all sure that I do. X is a producer. X operates, as owner and sole owner, three retail outlets, A, B and C. There are twenty other outlets to which it sells but in which it has no interest except that they are purchasers from X. X, under the Massachusetts statute, sets the price at 20 cents for retail sales. X observes this price at outlets A, B and C which X owns. The twenty independent outlets all observed it. Is this or is this not permissible under the Massachusetts statute?

Mr. ROSA. I say under the McKesson & Robbins cases, if your Honor pleases, it isn't permissible.

The COURT. Is this, then, a defense based upon a federal statute which you say is available as an overriding rule here? Even though Massachusetts law would have allowed this kind of agreement, had there been no federal statute, it is your view, number one, that this is prohibited by the federal law and the federal law in this matter is supreme? [34] I must say I don't know what case you are referring to, and I would be glad if you would give me the citation and let me look at it.

Mr. ROSA. United States v. McKesson & Robbins in 351 U.S. 305.

The COURT. Now, without binding you precisely on the facts in that case, would you tell me what the holding was?

Mr. ROSA. Well, the holding there, as I understand it, if your Honor please, is that where the person attempting to fix the prices is in competition at the consumer level, at the retailer level, the Court held in that case that it is not exempt from the provisions of the Sherman Act.

The COURT. Well, I had better take a look at the case, but what do you say it says, Mr. Bartlett?

Mr. BARTLETT. I haven't the foggiest idea. Maybe Mr. Keresey is familiar with it.

Mr. KERESEY. If your Honor please, McKesson & Robbins was a wholesaler as well as a manufacturer of cer-

tain brand name products. It had entered into fair trade agreements at the wholesale level, and in that case, since McKesson & Robbins was a wholesaler, the Supreme Court pointed out in that case—I believe about 50 per cent of McKesson & Robbins' business is as a wholesaler—it was in effect engaging in price fixing between itself and another wholesaler.

Now, I fail to see any connection between the McKesson [35] & Robbins case and the situation we have before us today.

The COURT. All right, I will look at it. [Examining book] Mr. Rosa, it might help me if you would state whether your client Secatore's, Inc. also sells in large quantities in a manner comparable to the way that the plaintiff sells to commercial accounts. Does it?

Mr. ROSA. We service trucking accounts, but the deliveries are not in 500- or 600-gallon lots, because it goes directly into the tanks of the dealers.

The COURT. This is not evidence I am asking you about, but I really want to understand your contention a little bit better. At what rate does your client sell these products? Is it a different rate than the posted rate for ordinary motorists who go by?

Mr. ROSA. We sell at the posted rate, the same as for ordinary motorists that go by.

The COURT. I confess that a very rapid reading of what is mostly a headnote in United States v. McKesson & Robbins, rather than the full text, makes me doubt the relevance of this testimony. But I take it that it would be better if at this stage I allowed the testimony, because I think it is not really contested as to what the facts are, and the only problem which is in dispute is as to the legal relevance of these facts. Isn't that right, Mr. Bartlett?

Mr. BARTLETT. Yes, I think that is true.

[36] The COURT. Then why don't you and Mr. Rosa just agree as to what the facts are, and it will avoid the examination and I will not have to make a ruling at this stage.

Mr. BARTLETT. All right. This bears upon the ownership of the real estate by the company in certain instances of leasing back—

The COURT. Well, why don't you now try to state what the facts are, and if Mr. Rosa is in contention with the statement then he is entitled to go on and develop it in detail.

Mr. ROSA. I think we will have to consult the witness, if your Honor please.

The COURT. All right.

[Counsel confer with witness.]

Mr. BARTLETT. I think Mr. Harding can do a better job on it than either Mr. Rosa or myself.

The COURT. All right, Mr. Harding, why don't you make a statement, which is not evidence, but which may be accepted later on by your counsel and by opposing counsel as the basis of a stipulation?

The WITNESS. Well, your Honor, to get back to the number of accounts in the Commonwealth of Massachusetts under lease arrangements, I pointed out before we have 344 accounts that are under lease in which we collect rent. We collect it by three or four different means, either gallonage, flat rental, [37] or incentive, as I indicated before.

But one thing I did not point out was that on the gallonage rate, in every case we have a minimum. For instance, we would collect, let us say, a cent and a half a gallon, with a minimum of $300 a month. The purpose of the minimum rate is to assure us sufficient recovery to cover the carrying charges on that particular outlet, primarily to build up sufficient revenue to cover taxes, depreciation,

amortization, maintenance, repairs, and so forth, exactly the same as the independent dealer owning his own property has to pay to run that business.

The gallonage rental is only a means to make it easy to collect, and for the dealer to pay, and that is the reason that we have gallonage at a minimum.

I think that is the question that Mr. Rosa had.

Mr. BARTLETT. Now, there are 344 of the lease stations, and the others of the 900 are what?

The WITNESS. We have 640 contract dealers, similar to Mr. Secatore, and 344 dealers under lease.

Mr. BARTLETT. And on the contracts, in the 640 instances, those are ones in which the company does not lease or own—?

The WITNESS. That is correct.

The COURT. Now, can you gentlemen agree that the statement which was just made by Mr. Harding shall be regarded as though it had been evidence?

[38] Mr. BARTLETT. Yes, sir.

Mr. ROSA. We agree.

The COURT. All right, it is so agreed. It might be a little helpful, in the event that this point became relevant, for the Court to have a copy of the lease arrangement. Have you got a copy with you?

The WITNESS. I do not have one with me, but certainly I can get one.

Mr. BARTLETT. I can get one for you.

The COURT. All right, I will reserve Exhibit number D for the plaintiff, for a model of one of the lease arrangements in connection with one of the 344 stations. It may be that in order to make a full disclosure, there being three types of categories of leases, that there should be three separate types offered under Exhibit D, and if so, the separate exhibits will be D-1, D-2 and D-3.

Mr. BARTLETT. All right, your Honor.

The COURT. It would be fairer, would it not, in order to make a full disclosure, to take the three separate ones?

The WITNESS. Yes, sir.

The COURT. Then I will now rule that D-1 through D-3 will be the three categories where there are leases on somewhat similar arrangements. Is there anything else you want to ask, Mr. Rosa?

Mr. ROSA. Yes, I do, your Honor.

[39] XQ. [By Mr. Rosa] Since the invoking or attempted invoking of fair trade by the plaintiff, have the prices to the so-called consumer accounts been changed? A. No, they have not.

XQ. So that since the invoking or attempted invoking of fair trade, the so-called consumer or commercial accounts are buying gasoline at substantially below the fair trade price that you set; is that right? A. Well, just let me check my records here to make sure that I am right. [Examining papers] On July 26th the dealer price was 14.9, and the commercial consumer price was 15.4. On August 8th the dealer price was 15.6 and the commercial tankwagon price was 16.1.

So I was wrong in saying there wasn't a change. There was a change in the commercial tankwagon at the same time that the dealer tankwagon price changed, which was August 8th.

XQ. But subsequent to the invoking or attempted invoking of fair trade, the plaintiff continued to sell to the consumer accounts at substantially less than the posted fair trade prices; that is right, is it not? A. The specific account you are talking about?

XQ. No, all consumer accounts. A. Well, the consumer price—you are making a comparison that I think has got to be explained.

XQ. Well, that is for the Court to determine. [40] A. Well, I would like to explain if the Court will permit it.

The COURT. Go ahead.

The WITNESS. You are making a comparison between the dealer price at the retail level and the commercial consumer price at the tankwagon level. They are two different things.

Now I would like to make the comparison I started before, that the dealer tankwagon price on August 8th was 15.6, and the consumer price in bulk deliveries to underground storage was 16.1. And I can't make comparisons between retail, which is a different type of delivery entirely than the tankwagon delivery.

XQ. Well, sir, nobody has asked you to make a comparison. But in any event, in so far as the retailer, so-called, deliveries to the retailer are in bulk, are they not? A. That is correct.

XQ. And deliveries to the so-called commercial or consumer accounts are in bulk, are they not? A. That is correct, if you determine that five gallons are in bulk. If you say that a five-gallon delivery into an automobile is a bulk delivery.

XQ. I am talking about delivery by the plaintiff to the dealers, not the delivery by the plaintiff to the commercial accounts. They are in bulk, are they not? A. That is right, but that is a wholesaler, not a retailer.

XQ. Well, you sell directly to the consumers in that event? [41] A. It is still a wholesale delivery.

XQ. Will you let the Court determine whether that is a wholesale delivery or not? A. Yes, sir.

XQ. You sell directly to the consumer, do you not?

Mr. BARTLETT. Well, your Honor.

The COURT. Well, I think there is no danger that at this stage the Court will be confused. Maybe it will be later.

XQ. The retailer, or the so-called dealer, sells directly to the consumer, does he not? A. A private consumer, yes.

XQ. The dealer sells to a private consumer? A. Yes, an individual like we consider a private consumer.

XQ. Well, in your experience, sir, you know that they also sell to fleets of trucks and automobiles? A. As they come into the station, into the truck.

XQ. Can you tell us how long the company—and by the company I mean the plaintiff—has been selling to the A. S. Campbell Company on a commercial basis? A. Wait until I get his contract here [examining papers]. The 8th day of August 1944.

XQ. Prior to that, did you know that the Campbell Company traded with the defendant? A. I did not, sir. I was not here at that time.

XQ. The company—and by the company I mean the plaintiff—has salesmen going around different areas soliciting commercial accounts? A. Yes, that is right.

[42] XQ. And salesmen have solicited commercial accounts in the trading area of this defendant since the posting of fair trade; that is right? A. I would assume so, yes. That is their job.

XQ. So that subsequent to the 8th of August, 1956, salesmen in behalf of the plaintiff have solicited commercial accounts in the trading area of the defendant and offered to sell them gasoline at approximately 4.8 cents per gallon less than the so-called fair trade price? A. Depending upon the account, if they have, and I assume that they have contacted accounts.

The COURT. The answer, in short, is Yes?

The WITNESS. As far as I know. I haven't been with them, your Honor, so I assume that they have and the answer would be Yes, that they have contacted.

XQ. And the company, at its expense, and again I say by the "company" I mean the plaintiff, offers to install underground storage space and pumps on the premises of the prospective customer.

Mr. BARTLETT. Wait a minute.

A. If—

Mr. BARTLETT. I am just a little afraid of that question. Does he mean a commercial dealer?

The COURT. I think you did mean commercial dealer, did you not?

[43] Mr. ROSA. Yes, I do.

The WITNESS. I didn't hear—

The COURT. The question is in connection with commercial dealers does the plaintiff offer to install pumps and so forth?

The WITNESS. If the account does not have the equipment underground at the present time, we would. Invariably the accounts have equipment and it is a transfer from one supplier to another.

XQ. Now, you told us, sir, that if fair trade prices are not maintained by dealers that it would cause a loss of sales on the part of the plaintiff? A. That is correct.

XQ. Do you mean to tell us, sir, that if gasoline is sold at a less price than the so-called fair trade price, that less gasoline would be sold? A. If a specific dealer sells product below the fair trade price it has a tendency and would very definitely decrease the sales of the product sold by the other Esso dealers in the community.

XQ. My question to you, sir, was, Do you mean to tell the Court that if gasoline is sold at a price less than the so-called fair trade price, that less gasoline will be sold? A. Yes, because the public—

XQ. You have answered it, sir. [44] A. Yes, because the public would be buying—

XQ. Your answer is Yes? A. No. Let me explain, will you please? I said that the public, we would lose—

Mr. ROSA. I pray your Honor's judgment.

A. [Continued] —injure our trade name—

Mr. BARTLETT. The answer Yes is perfectly all right with me.

The COURT. Just a moment. I thought that, Mr. Bartlett, when you put those questions, you were going into an issue which was not necessary for a Judge to consider. I cannot in any way blame Mr. Rosa for following up on cross-examination but it does seem to me that both counsel are inviting the Court to reconsider a matter on which the Legislature of Massachusetts has spoken and that I must assume that there is some public policy which is served. And the Legislature apparently thought that regardless of what the volume of sales was, the general net economic advantage from a fixed fair trade practice was greater than from an open competitive market. Regardless of whether I share that view, I must follow it.

Mr. BARTLETT. As the questions were being asked, your Honor, the very point was running through my head but since I had asked the questions I had to keep quiet.

XQ. I believe, sir, that you told us that in so far as you know, with one or two exceptions, all the other dealers were complying; [45] is that right? A. I said that we had cases at the start where dealers did not comply but within a relatively short time they did and where they were down and they received the letter from the company they went up in price. There have been times when they have been down but today every dealer in the Commonwealth of Massachusetts selling Esso gasoline is selling at the fair trade price, to the best of my knowledge.

XQ. Has it come to your attention, sir, that some of the dealers are giving trading stamps? A. If they are, we—

The COURT. No. Please answer it. Has it come to your attention that some of the dealers are giving trading stamps?

The WITNESS. Esso dealers?

XQ. Yes. A. Giving trading stamps for motor oil, lubrication and so forth—

XQ. No, my question— A. Not gasoline, as far as I know.

XQ. Not gasoline, as far as you know? A. As far as I know, no, sir.

XQ. So that you now want to leave it, sir, that it has never come to your attention that Esso dealers were advertising the giving of trading stamps? [46] A. I don't know of any case. It hasn't come to my personal attention.

XQ. You have been on a tour with the company in the last few days, have you not? A. I have been on a tour since last Monday.

XQ. Have you had occasion on this tour to go along Route 1 from Revere north? A. We were on Route 1 on Monday.

XQ. And you are familiar with the Esso station in Lynnfield? A. Yes, I am. Which one?

XQ. [handing]. Is that a photograph, sir, a fair representation of the Esso station in Lynnfield as you saw it on Monday?

Mr. BARTLETT. Yes or No.

A. I would say to the best of my ability it is the Esso station in Lynnfield, yes, sir.

The COURT. That is received in evidence as Exhibit 2.

Mr. BARTLETT. May I take a look at it, your Honor?

The COURT. Yes. There is no doubt about it?

Mr. BARTLETT. No, I suppose not. I would like to see what it shows [examining].

[Photograph of Esso station in Lynnfield marked Defendant's Exhibit 2.]

XQ. And that photograph, sir, advertises the giving of trading stamps? A. It shows a sign for trading stamps.

XQ [handing] I now show you, sir, a photograph of the

Esso [47] station in Saugus on Route 1. That is a fair representation of that gasoline station as you saw it on Monday, is it not? A. Yes, sir, it looks like the station as we saw it on Monday.

XQ. And that, too, advertises the giving of trading stamps, does it not? A. There is an S & H stamp there, yes, sir.

The COURT. Have you seen that photograph?

Mr. BARTLETT. Yes, your Honor.

The COURT. Admitted as Exhibit 3.

[Photograph of Esso station in Saugus marked Exhibit 3.]

XQ. [handing] I now show you, sir, a photograph of a gasoline station, Esso, on Route 1 in Peabody. Is that a fair representation of that gasoline station as you saw it on Monday, sir? A. We didn't go by that station on Monday.

XQ. You didn't go by that station? A. No, sir.

Mr. BARTLETT. It is all right.

The COURT. Are you admitting it?

Mr. BARTLETT. Yes.

The COURT. Without objection it is admitted as Exhibit 4, by concession of plaintiff's counsel.

[Photograph of Esso station in Peabody marked Defendant's Exhibit 4.]

Mr. BARTLETT. Will you tell us when it was taken?

The COURT. In Peabody.

[48] Mr. ROSA. Do you want that in the record?

The COURT. Instead of going ahead with these, how many photographs have you?

Mr. ROSA. Just these three, your Honor.

The COURT. All right.

XQ. You are familiar with the location of the defendant's Waldemar station in East Boston? A. Yes.

XQ. And that is on Route C-1, isn't it, that leads into the Newburyport Turnpike and Route 1? A. Yes.

Mr. ROSA. Will your Honor excuse me just a half a minute?

The COURT. Surely.

[A brief pause.]

XQ. Of course, Mr. Harding, you have had a long and varied experience in the sale of gasoline? A. [Nodding.]

The COURT. The answer is Yes?

The WITNESS. Yes; I will have to say Yes, your Honor.

XQ. And you know that if you sell the A. S. Campbell Company gasoline at 24.1 that a dealer can't compete with you to sell the gasoline at the same price? A. The dealer isn't competing with that type of business.

XQ. You mean dealers do not have any customers to whom they [49] sell 7,000 gallons of gasoline a year? A. They do.

XQ. They do have? A. Sure.

XQ. So they do compete with that type of business, do they not? A. You referred to the Campbell Company?

XQ. Well, the Campbell Company uses 7,000 gallons of gasoline a year? A. Campbell Company has been our account since 1944, under contract.

XQ. But you do solicit comparable accounts? A. That's right.

XQ. At which you offer gasoline at 24.1? A. That is right.

XQ. And retail dealers service comparable accounts, too? A. That's right.

XQ. So that it is fair to state that a retail dealer can't compete with you in the servicing of accounts of that nature? A. I would like to answer that, if I—

XQ. No, please. It is fair to state that, isn't it? A. Yes.

Mr. ROSA. That's all.

The COURT. Is there any redirect examination?

Mr. BARTLETT. Yes, I have a few questions.

[A brief pause.]

[50] Mr. BARTLETT. No, I have no questions.

The COURT. You are excused, Mr. Harding Is there any other testimony which the plaintiff wishes to offer?

Mr. BARTLETT. No, your Honor.

The COURT. Is there any testimony which the defendant wishes to offer?

Mr. ROSA. Yes, your Honor.

The COURT. Will you just indicate to me, not by a formal lengthy opening statement, how much testimony you are going to offer?

Mr. ROSA. The only testimony I am going to offer is two purchases made within the last few days at these stations where stamps were given.

The COURT. That's fine. As I take it, the testimony won't last for any more than ten or fifteen minutes.

Mr. ROSA. I think not.

The COURT. Then I won't recess until after that.

FRANKLIN SECATORE, *Sworn*

Direct Examination by Mr. Rosa

Q. What is your name, sir? A. Franklin Secatore.

Q. Where do you live? A. Sudbury, Massachusetts.

Q. And you are an officer of the defendant corporation?

[51] A. That's right, sir.

Q. And what office do you hold? A. Treasurer.

Q. Now, on the 18th of September, 1956 did you purchase gasoline on the Newburyport Turnpike at an Esso Station? A. I did, sir.

Q. At which station was it? A. One was at the Lynnfield station next to Ship's Haven, Camilieri, I think it is, sir.

Q. And I show you that card and those stamps [handing].

The COURT. Before you do that, may I, for my own information, know whether the station shown in Exhibit 2 is the station to which the witness refers? Will you show him the photographs, Exhibit 2?

Q. [handing] Is that the gasoline station at which you made a purchase? A. This is it.

The COURT. I am sorry I interrupted you. You were going to ask him about the coupon.

Q. What did you buy there, sir? A. We purchased gasoline and two quarts—

The COURT. Who is the "we"?

The WITNESS. I and another gentleman, sir. We purchased gasoline and two quarts of motor oil.

Q. What kind of gasoline did you purchase? [52] A. Esso Extra.

Q. And when you purchased the gasoline you paid how much for it? A. $5.30 for the whole thing. $4.20 for gasoline.

Q. And was that the posted price—did you pay the posted price for the gasoline? A. I did, sir.

Q. And what if anything did you get from the operator? A. I got 13.2 gallons of gasoline and two quarts of Uniflow.

Q. And did he give you any stamps? A. I asked him—

The COURT. Yes or No.

A. [continued] Yes.

Q. And at that time did you ask for a sales slip? A. I asked him for a cash slip.

Q. Did he give it to you? A. Yes, and I also asked him for my stamps and he did, also.

Q. Has the advertising been going on since the invoking of the fair trade—

The COURT. Now, just a moment. I haven't yet got the form of the cash slip and stamps. Do you want to show them to the other side?

[Mr. Rosa hands papers to Mr. Bartlett.]

Mr. BARTLETT. That's all right.

The COURT. There being no objection, the cash slip and stamps relating to the Esso station in Lynnfield are received [53] in evidence as a group exhibit, Exhibit 5.

[Cash slip and trading stamps relating to Esso station in Lynnfield marked Defendant's Exhibit 5.]

The COURT. There is no question, I suppose, that upon inspection of these documents it appears that the stamps are in an amount which covers both the sale of gasoline and sale of Uniflow?

Mr. BARTLETT. That I don't know but—

The COURT. Have you made a calculation, and does it?

The WITNESS. Yes, it does, your Honor.

Mr. ROSA. May we have in the record, if your Honor pleases, the number of stamps, too?

The COURT. How many are there?

Mr. ROSA. I haven't counted them.

The COURT. Mr. Duwan will count them.

Q. You travel this highway twice every day going back and forth to Sudbury? A. I do.

Q. And since the so-called invoking of fair trade has each of these stations advertised the giving of stamps?

The COURT. By "each of these stations" you mean the

Esso stations at Lynnfield, Saugus and Peabody, the ones covered in Exhibits 2, 3, and 4?

Mr. ROSA. That's right, your Honor.

The COURT. The answer is Yes?

[54] The WITNESS. Yes, sir.

Q. Did you call this condition to the attention of anybody connected with the plaintiff? A. I talked it over with my district manager.

Q. And that is who? A. Mr. D. Hart.

Q. And how long ago was it, the first time, that you had occasion to talk to Mr. D. Hart about it? A. Two or three weeks, I would say. A couple of weeks.

Q. You came by there this morning on your way to work? A. I did.

Q. Are the signs still up advertising the giving of stamps? A. They are still up in full view.

Q. Did you go to another station to buy gasoline? A. I did.

Q. And what station did you go to? A. The Peabody station.

Q. And that is the Peabody station shown in this photograph [handing]? A. That's correct, sir.

Q. And that, too, was an Esso station? A. That is right.

Q. When did you go there, sir? A. On the same day.

Q. And that day was what? A. On the 18th of September.

[55] Q. Did you buy gasoline there? A. We did buy gasoline there.

Q. [handing] I show you that sales slip. How much gas did you buy and what kind? A. $3.05 of Esso Extra.

Q. Did you buy anything else besides gasoline? A. No, sir.

The COURT. Before we get into this any further, Mr. Duwan, have you been able to count the number of stamps which there were in Exhibit 5?

The CLERK. 54.

The COURT. Thank you. We now are back again talking about the Peabody station and the sales slip and the trading stamps are now offered in evidence?

Mr. ROSA. They are, your Honor.

The COURT. Is there any objection?

Mr. BARTLETT. No, your Honor.

The COURT. There being no objection, the group is received as Exhibit 6, and how many trading stamps?

Mr. ROSA. 30.

The COURT. Thank you. 30 trading stamps together with sales slip.

[Sales slip and 30 trading stamps from Peabody Esso station marked Defendant's Exhibit 6.]

[56] Q. How much did you spend at that station? A. $3.05.

Q. Did you talk with Mr. De Hart about the Peabody station? A. No, I didn't talk to him on any particular stations. I told him of stations that were giving stamps, that they should be eliminated.

Q. Now, since the invoking of the so-called fair trade, have salesmen of the plaintiff solicited the customers of yours, to sell them as commercial accounts? ..

Mr. BARTLETT. I will have to object.

The COURT. Well, first of all, does he know about this of his own knowledge, or are you just asking for hearsay? Have you actually seen any solicitation of any of your customers by any of the plaintiff's representatives?

The WITNESS. No, sir.

The COURT. Well, I think it is hearsay.

Mr. ROSA. I will withdraw it. I think that is all.

The COURT. Is there any cross-examination?

Mr. BARTLETT. Yes, sir.

Cross-examination by Mr. Bartlett

XQ. Mr. Secatore, when did you discuss this with Mr. De Hart? A. A couple of weeks ago he was in my office, and I spoke to him in particular about all these stations who were advertising stamps—

XQ. Mr. Secatore, I wish you would answer my question. [57] A. Excuse me.

XQ. It was a couple of weeks ago? A. That is right.

XQ. And was it after or before the 8th? A. After the 8th, after the 8th of August.

Mr. BARTLETT. That is all. Thank you.

ISAAC SHULMAN, *Sworn*

Direct Examination by Mr. Rosa

Q. Your name, sir? A. Isaac Shulman.

Q. And where do you live? A. 128 Devon Street, Roxbury.

Q. On the 18th of September, were you with Mr. Secatore? A. Yes, sir.

Mr. BARTLETT. Unless Mr. Shulman has something to add, your Honor, we will agree—

The COURT. All right, it is agreed that he would corroborate Mr. Secatore on the testimony just given. Is that all you called him for?

Mr. ROSA. That is right.

The COURT. You are excused. Is there any other testimony?

Mr. ROSA. No further testimony.

The COURT. Is there any rebuttal?

Mr. BARTLETT. One moment, your Honor (conferring with [58] associates). I would like to have Mr. De Hart testify briefly.

ROBERT H. DE HART, *Sworn*

Direct Examination by Mr. Bartlett

Q. Your full name, Mr. De Hart? A. Robert Hulfish De Hart.

Q. You live where? A. In Melrose, Massachusetts.

Q. Do you work for the Esso Standard Oil Company? A. I do.

Q. And what is your job? A. District manager in Massachusetts.

Q. The State of Massachusetts? A. It does not encompass the entire State, no.

Q. The eastern part of the State? A. The eastern part of the State.

Q. How long have you been with the company? A. Since 1933.

Q. Now, I am limiting my questions, Mr. De Hart, to the matter of trading stamps. The area brought out by the defendant is within your territory, is it? A. It is.

Q. Now, on August 8th, at the time that the salesmen were sent out, were there instructions as to whether or not trading stamps could be given for gasoline? A. There were.

[59] Q. What were the instructions? A. All of our sales people contacting dealers in the trade were instructed that the use of green stamps related to the sale of gasoline was not allowed, could not be tolerated.

Q. And by green stamps, you mean trading stamps? A. Trading stamps.

Q. And subsequent to that date, have efforts been made to ascertain whether or not dealers complied with this, as well as with the matter of the posted price? A. To the best of my knowledge we have had no complaints other than one, in which case we have posted the location and intend to take action.

Q. Where was that? In what area? A. If you will give me a moment, I will give you the exact location.

Q. Well, it doesn't make— A. It is in Dorchester.

Q. And that is the only one that came to your attention? A. That is right.

Q. Is it a fact that oil and accessories are included within the ban of trading stamps? A. It is my understanding that the ban is related only to the fair trade products we handle, which is Esso gasoline.

The COURT. I don't know what the word ban means.

Mr. BARTLETT. Strike it out.

[60] Q. As I understand it, the instructions were that trading stamps were not to be given for fair traded products? A. That is correct.

Q. At the minimum price? A. That is correct.

The COURT. You mean that is the instruction from you to whom?

The WITNESS. To my salesmen, who in turn related that to their customers.

Q. Were there any instructions given as to the matter of giving trading stamps for articles that might be sold at the station other than fair traded articles? A. No.

Mr. BARTLETT. That is all.

Cross-examination by Mr. Rosa

XQ. You say, Mr. De Hart, that only one situation came to your attention of the giving of stamps? A. One specific location.

XQ. And when did that come—

The COURT. I don't understand what that answer means. You emphasized the word "specific" in your answer. What are you implying by that emphasis?

The WITNESS. If I may—it has been stated this morning that Mr. Secatore had spoken to me about trading stamps in a certain group of stations. However, there was

no location [61] other than geography mentioned at that time.

The one I referred to, on which we are taking action, we have had a complaint given to us by trade name and by address, and have acted on it.

XQ. And when did this specific location, as you characterize it, come to your attention? A. About 10 days ago.

XQ. You say you live in Melrose? A. Correct.

XQ. You pass the Saugus station every day? A. Yes.

XQ. Do you also pass the Lynnfield station? A. No, I don't.

XQ. You are familiar with both? A. Yes.

XQ. The Lynnfield and Peabody station? A. I am.

XQ. And since August 8th each of these stations has advertised the giving of green stamps, in the form of signs; that is right, isn't it? A. They have green stamp signs, yes.

XQ. Yes, that they give green stamps and the signs so state? A. The Saugus station has an addition to the green stamp sign, which says "Not on gas".

XQ. I show you this photograph, Exhibit 3. That photograph is a [62] fair representation of the Saugus station, is it not? A. Fair to the extent that it does not include the sign that I refer to, which is on the far right side of the driveway.

XQ. You say there is a sign on the far right side of the driveway? A. Of the ramp, which would be down in here (indicating). There is a large sign, I would say at least four by six, an "S. & H." sign, and at the bottom it says, "Not on gas".

XQ. Well, that photograph shows an "S. & H." sign, doesn't it? A. Yes, it does.

XQ. And there is nothing on that sign? A. There is nothing on this sign.

XQ. And you did from time to time see the advertising

on the Peabody and Lynnfield stations, of the giving of stamps? A. Yes.

XQ. And you know from your experience, sir, that about 95 per cent of the dollar volume of business of a gasoline station is gasoline? You know that, sir, from your experience? A. I do not.

The COURT. Well, more than 90 per cent? Right?

The WITNESS. I believe I would, as a general statement, put it lower.

XQ. How much lower? A. I would think an average would be nearer 75.

XQ. So that you want to leave it that about 75 per cent of the dollar volume of a gasoline station is the sale of gasoline? [63] A. Yes.

Mr. ROSA. That is all.

The COURT. Is there anything further in the way of testimony?

Mr. BARTLETT. Yes, your Honor. Mr. Pecoraro, please.

JOSEPH M. PECORARO, *Sworn*

Direct Examination by Mr. Bartlett

Q. Your full name, sir? A. Joseph M. Pecoraro.

Q. Where do you live? A. In Lexington, Mass.

Q. Do you work for Esso? A. I do

Q. What is your job? A. I am a salesman.

Q. What is your territory? A. I cover the North Shore area from Malden to the Gloucester line.

Q. Does that include the Peabody and Lynnfield stations? A. It does.

Q. Now, on August 8th did you have certain instructions from Mr. De Hart or others as to the handling of trading stamps? A. I did.

Q. And what were they? A. The instructions were that the giving away of any article of [64] value and stamps was strictly prohibited with the sale of gasoline.

Q. Thereafter? A. Thereafter.

Q. What did you do about it? A. In my contacts with my trade I explained the letter which had gone out to each dealer setting forth the fair trade notice, and I specifically pointed out that clause in that letter which set forth that stamps or other articles of value were not to be given away with the sale of gasoline.

Q. And then at a later time what observation of the stations did you make to check on whether or not there was compliance? A. In some cases when we first started off—

The COURT. No, what you did.

The WITNESS. I saw occasions probably within the first week or so where dealers were giving out stamps, and I assumed in watching the operators at the pump island that the stamps that they were giving were with the sale of gasoline. And in each case I counseled and cautioned the dealer that he was in violation of the law and that the giving away of stamps could not be done.

In no case I observed after that did I see any stamps being given out. If I did, I immediately took issue with the dealer and in most cases, in all cases—but I had specific cases where the dealer told me that if he couldn't give the [65] stamps out with gas he might as well give up the stamps, so he did.

Mr. ROSA. I pray your Honor's judgment.

The COURT. Well, that really isn't offered as proof of the matter asserted, but it is offered as a threat, and as a verbal act it may be testified to. I don't mean your threat, Mr. Witness.

The WITNESS. No.

The COURT. Your customer said he couldn't continue, and as a matter of fact he did discontinue.

The WITNESS. That is right.

Q. Are you familiar with the station concerning which Mr. De Hart just testified? A. Which station is that?

Q. The one in which Mr. De Hart stated that the sign in the picture stated "Not for gas"? A. Yes, sir.

Q. Do you know how long that sign has been up? [A pause.] The "Not for gas" part of it? A. I would say about a week, sir.

Q. Prior to the time of its going up, did you have any discussion with that dealer? Yes or no. A. I did.

Mr. BARTLETT. That is all.

[66] *Cross-examination by Mr. Rosa*

XQ. You are familiar with the Lynnfield Esso Station? A. I am.

XQ. There are no signs there saying "Not for gas" on stamps? A. No, sir.

XQ. And the same thing holds true on the Peabody station? A. Which station in Peabody are you referring to?

The COURT. The one which is shown in Exhibit 4, which you may look at.

XQ. The Esso station shown in Exhibit 4 in Peabody (showing). There are no signs on that station saying "Not for gas"? A. If I may say so, this is not one of my accounts. This is handled by a distributor.

XQ. Well, you go up and down that road? A. I do, sir.

XQ. You are familiar with that station? A. I am, sir.

XQ. You have seen that station advertising the giving of stamps? A. I have, sir.

XQ. And you have seen no sign that says "Not for gas" at that station? XQ. That is correct, sir.

XQ. Now, if I understand you correctly, sir, the only thing that you did in the form of checking up whether or not these dealers did or did not give stamps, was to go

into the station and watch [67] them; is that right? A. That is right, sir.

XQ. And they knew you? The dealer knew you? A. He did.

[68] XQ. Knew you were from the Esso Standard Company? A. He did.

XQ. And you hardly expected that he would give out stamps in your presence; that is right, isn't it? A. I would assume so.

XQ. You wouldn't expect him to, would you? A. I certainly would not.

XQ. And that is the only thing that you did in so far as checking up on the giving of stamps by these dealers? A. May I answer that?

The COURT. You may answer if there is something else you did.

The WITNESS. Sir, in my job—

The COURT. No, no, don't tell us about your job. You were asked what you did.

The WITNESS. I have contact with customers.

The COURT. No. What did you do?

The WITNESS. If I may, your Honor, customers have complained to me at the locations requesting knowledge from me as to why they could not receive stamps and I attempted, in many cases, to educate the customers to the fact that the stamps could not be given out. More of a public relations job with our customers, because it became an incessant clamour that the stamps were not being given out, and I assumed, when I received this clamour from the customers, that my dealers were adhering [69] to the policy of not giving stamps.

The COURT. In short you told customers who protested that they could not have stamps, consistent with your policy?

The WITNESS. That's right.

XQ. No customer of these stations ever complained to you, that you have seen in the exhibits, these three Esso stations on Route 1? A. Yes, sir, there was one.

XQ. And was that one customer that complained somebody that you knew? A. He gave me his card, sir.

XQ. No, please.

The COURT. Was it somebody you knew?

The WITNESS. No, sir.

XQ. Well, how did this customer know you were connected with the Esso Company? A. He walked into the office last Monday morning while I was there.

XQ. Into the company office? A. No, into the office of the service station.

XQ. In which station? A. This is the Lynnfield station, and he asked me if I were the proprietor and I stated at that time I was not but I was the sales representative in the area and he then proceeded to tell me that he had been refused green trading stamps and that [70] he did not think it was fair and there I proceeded to explain the policy as it stood on the giving away of stamps with gasoline.

XQ. How long were you connected with the gasoline business? A. Seventeen years.

XQ. Would you say about 90 per cent of the business of a gas station is the selling of gasoline? A. I would not.

XQ. You would not? A. I would not.

XQ. What proportion of the dollar volume of sales of a gasoline station would you say was for gasoline? A. Depending upon the location, I would say between 70 and 80 per cent.

Mr. ROSA. That's all.

Mr. BARTLETT. That's all.

The COURT. Is there any other testimony in rebuttal?

Mr. BARTLETT. I have none.

. . . . . .

[90] The COURT. I am not saying what you are. I refuse to call you retail or wholesale or anything else. I am merely saying that in a business like Campbell's you are competing with the defendant.

. . . . . .

Opinion.

October 3, 1956

WYZANSKI, D. J.

In this suit, founded on the diversity jurisdiction of this Court, plaintiff seeks a temporary injunction restraining defendant, which has not signed any fair trade agreement, from selling in Massachusetts at retail plaintiff's products "Esso" and "Esso Extra" at prices less than the minimum retail prices established by fair trade agreements plaintiff has made with third parties pursuant to the Massachusetts Fair Trade Law. Mass. G. L. c. 93 § 14A-C.

Plaintiff filed the usual type of complaint in a suit against a non-signer. Defendant stipulated that virtually all plaintiff's allegations may be taken as true and raised only three points: first, that plaintiff's fuel sales contract with defendant bars the relief sought; second, that plaintiff competes with retailers in selling to ultimate consumers and so cannot validly make with retailers agreements fixing minimum resale prices; and third, that plaintiff has by inaction failed to require other retailers to observe plaintiff's fair trade agreements.

The Massachusetts Fair Trade Act is cast in familiar terms. Section 14A of chapter 93 permits the insertion in contracts relating to the sale of certain commodities, the vending equipment from which said commodities are sold to consumers bears the brand of the producer, provisions

"that the buyer will not resell such commodity except at the prices stipulated by the vendor." Then §14B provides that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the preceding section, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby."

Without any reference to this Act, plaintiff on September 29, 1953 entered into a fuel sales contract whereby it agreed to sell defendant and defendant agreed to buy "Buyer's requirements of Esso and Esso Extra" at "Seller's posted dealer tank wagon price". The agreement was to be effective for three years from May 1, 1954. It provided in the ninth paragraph: "There is no understanding or agreement, express or implied, on any of the subjects referred to in this agreement other than those specifically stated herein."

At the time of the three year contract plaintiff had not entered into any fair trade agreements in Massachusetts with anyone.

On August 7 and 8, 1956 plaintiff made with various retailers other than defendant agreements, which defendant admits comply with the Massachusetts act, setting minimum retail prices for Esso and Esso Extra.

Defendant has not observed those minima and does not intend to do so, unless required by order of the Court.

Defendant's first contention is that since plaintiff in agreeing to supply defendant's requirements for three years of Esso and Esso Extra failed to reserve the right to require defendant's adherence to minimum resale prices, defendant is now disabled from making such a requirement. The suggestions are that the contract between the parties is detailed and was drawn by plaintiff; and that to

insert a new condition would do violence to the intention of the parties.

This argument is unsound. Plaintiff claims no express or implied rights arising from its three year contract with defendant. It relies exclusively on a power derived from a Massachusetts statute permitting proceedings against even those who do not sign price maintenance agreements. It is defendant that claims that plaintiff has abandoned one of its statutory rights. And the argument is that the abandonment while not expressed in the contract is implied.

There is no general doctrine that failure in a contract to refer to a supplementary power conferred by the legislature indicates an intent to abandon reliance on it. Moreover, in this contract there is in no indication that the parties contemplated such an abandonment. Here only one of two interpretations of the 1954 contract is possible. Either, as I believe, the parties were not dealing in any way with the subject of resales, and hence no implication is possible; or, alternatively, they were dealing with that subject but specifically agreed in paragraph 9 that there was no implied understanding between them as to the plaintiff's abandoning its statutory rights with reference to that subject.

Before leaving this first contention, I should add that I have not overlooked a related argument. It may be said that it is a fact (of which a court should take judicial notice) that a gasoline station has a strong economic tie to a particular brand of gasoline, and that when it has agreed that during a three year period it will take all the gas of that brand it requires from a particular producer, it is unfair for that producer to exercise against that retailer its power to fix resale prices.

It is true that some courts have ruled that a producer's statutory power to fix resale prices cannot be invoked

against goods which that producer had sold and delivered before it had notified the purchaser of those goods that they would be subject to fair trade prices. *James Heddon's Sons* v. *Callender*, D. Minn., 29 F. Supp. 579; *Lionel Corp.* v. *Grayson-Robinson Stores, Inc.*, N. J. Sup. Ct., 1954 Trade Cases Paragraph 67, 717; *Seagram Distillers Corp.* v. *Seyopp Corp.*, 2 N. Y. Supp. (2d) 550. These cases go to an extreme point in creating a judicial exception not provided for by the legislature. They are founded on the plausible theory that the retailer is caught in an inequitable, unforeseen dilemma from which the court must extricate him. And these cases accomplish what they regard as an equitable result not by merely allowing the retailer to return the goods, but by allowing the retailer to sell at below minimum prices,—a consequence that might in some instances for a period of time render practically ineffective the producer's capacity to enforce against other retailers a resale price maintenance policy. Whatever may be said about these precedents on their precise facts, this Court will not extend their doctrine to allow a retailer to escape compliance with resale price maintenance in connection with goods which he does not have on hand, of which he is not legally obliged to take delivery, and which he plans to take merely as a matter of economic pressure. To make this exception would be to invade the legislative province. It would be to show a reluctance to enforce a policy which the legislature has sanctioned.

Defendant's second main contention is that plaintiff's fair trade agreements violate §1 of the Sherman Act and are not immunized by the exculpatory provisions of the Miller-Tydings Act or the McGuire Act, 50 Stat. 693, 66 Stat. 632.

The facts developed at the hearing on the temporary injunction indicate that plaintiff is a producer, that it does not itself operate any service stations, and does not make

any sales in small quantities such as the 20 gallon or smaller units which are customary when service stations dispense directly to the tanks of motor vehicles. However, in Massachusetts plaintiff does sell to a few hundred commercial customers who are ultimate users. These sales are on an annual or similar periodic basis and cover at the least several hundreds and generally several thousands of gallons. In these sales the commercial customer must have his own pumps and must incur whatever costs there are with respect to holding an inventory, storing gasoline, insuring it, and transferring it from the pumps to motor vehicle tanks.

Those with whom plaintiff has made fair trade agreements are the familiar service stations seen upon every roadside. These stations are available at locations convenient for traffic. They sell to passing motor vehicles. Purchasers buy in small quantities and receive whatever service is necessary in transferring gasoline from the seller's pump to the user's motor vehicle tank. A user who purchases in this way has no problems of carrying an inventory, storing it, insuring it, or transferring it from bulk to small quantity units.

The fair trade agreements which plaintiff has negotiated with retailers do not specify that they are limited in their coverage to sales from service station pumps to the tanks of consumer's motor vehicles. But plaintiff so construes the agreements. In the light of the practice of the industry which must have been familiar both to plaintiff and the retailers who signed the agreement, this Court concludes that plaintiff is correct in its construction of the fair trade agreements. Thus so far as either plaintiff's fair trade agreements or the Massachusetts state law is concerned, a signer or a non-signer of a fair trade agreement may sell a tank wagon to a customer's pumps at any price he pleases. In short, there is no attempt on the part of plain-

tiff to fix minimum sale prices where the customer buys gasoline for delivery to pumps on his own premises.

The broad question raised by these facts is whether plaintiff because he does sell to ultimate customers is prohibited from agreeing with service stations as to the minimum price at which they will sell producer's branded products to ultimate consumers.

We may assume that such price fixing agreements affect interstate commerce and would violate §1 of the Sherman Act unless the agreements have been immunized by the Miller-Tydings or the McGuire Acts. Those acts provide an exemption for resale price maintenance contracts from the prohibition of the anti-trust laws. However, the exemption is so limited as not to apply to "any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

It does not seem to me that much need be said about the contention that plaintiff is a "retailer" or, at least, a "retailer" of the same type as a service station, so that agreements between plaintiff and a service station are agreements "between retailers". In those situations where plaintiff does sell to ultimate consumers, the characteristics of these sales and the quantities involved are not functionally comparable to small retail sales from a pump to a car tank. In the sense of these statutes, the plaintiff either is not a "retailer" or, alternatively, is a "retailer" of a class different from a service station.

But that conclusion does not resolve the question whether plaintiff is, within the meaning of the language just quoted, "in competition with" retail service stations.

This question is not easily solved, especially after the opinion in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305. From that case it appears that little help is to be garnered from the legislative history or the supposed policies of the Miller-Tydings and McGuire Acts. The judicial duty is to hew strictly to the letter of the law in deciding whether plaintiff is "in competition" with those with whom it has executed resale price maintenance agreements.

Admittedly in the case at bar there is an area of competition. In some marginal situations a commercial customer might hesitate whether to purchase in small lots from a service station dispensing to tanks of motor vehicles or to purchase in larger quantities from plaintiff's tank wagons dispensing to installations and pumps on the customer's property. Indeed just such an instance did occur in 1944, twelve years before fair trade agreements were in vogue, when defendant lost one customer to plaintiff. But this must have been a rare situation. Large customers would almost always prefer quantity sales at the lower unit price which tank wagon deliveries involve. Moreover, regardless of the theory of the matter, the evidence proves that the actual area of competition so far must be very small since plaintiff's total list of commercial customers in Massachusetts has only a few hundred names, while service stations presumably have hundreds of thousands of customers.

Not only is the competition infinitesimal in numbers, also it is competition between offers essentially different in character. The service station offers convenience of location and small quantities without any burden upon the customer to pay storage, insurance, and similar charges. Plaintiff offers gasoline in bulk, and leaves to the customer the responsibility of service, storage, insurance, and the like. Such distinctions are as great as those between what the Miller-Tydings and McGuire Acts denominate a "re-

tailer" and a "wholesaler". And if retailers and wholesalers ordinarily are not in competition because of the differences in their customers, methods of distribution, and quantities of sale, it is difficult to see any policy or other reason why, absent any shewing of substantial actual competition, service stations and plaintiff should be thought to be in competition.

Hence, though not without doubt, I conclude that the evidence shows that plaintiff is not in competition with service stations, and can validly make with them resale price maintenance agreements.

It is unnecessary to comment at length on defendant's third contention that plaintiff has failed effectively to enforce its fair trade policy against other non-signers who were known violators. The testimony on this contention was sparse. On the whole, it showed no slackness on plaintiff's part. Where retail service stations had given gas customers service stamps together with gasoline, plaintiff's agents told the station owners that this was not permissible under the fair trade agreements. In one or two cases this warning had not yet become effective but plaintiff was neither complaisant nor dilatory in not having as yet resorted to legal action.

Temporary injunction to issue.

WYZANSKI
United States District Judge

Preliminary Injunction.

[Entered October 5, 1956.]

This cause came on to be heard at this term on prayer and Plaintiff's motion for Preliminary Injunction and the court having considered the complaint and having heard

oral evidence in open court, it is ordered, adjudged and decreed that:

The Defendant, its servants, agents and employees and all persons acting in concert with it or under its authority and control be and they hereby are restrained and enjoined, pending the determination of this action, from advertising, offering for sale or selling at retail, the Plaintiff's motor fuels, "Esso" and "Esso Extra", from vending equipment bearing the Plaintiff's trademarks, brands or names, "Esso" and "Esso Extra", or otherwise, at prices less than the minimum retail prices now established or subsequently established by the Plaintiff's Fair Trade Agreements entered into by the Plaintiff.

WYZANSKI
Judge, U. S. District Court

Motion to Amend Defendant's Answer.

[Filed November 16, 1956.]

Now comes the defendant in the above entitled action and moves that its answer, heretofore filed, be amended by adding the following:

FIFTH DEFENSE

The plaintiff has permitted and is permitting retail dealers competing with the defendant in the sale of Esso and Esso Extra gasoline to sell said gasolines at less than the minimum fair trade prices fixed by the fair trade contracts and has neglected and failed to enforce such fair trade prices effectively.

SIXTH DEFENSE

The plaintiff, since the commencement of this action, has engaged in inequitable conduct which bars it from injunctive relief.

SEVENTH DEFENSE

The fair trade agreements of the Plaintiff violate Section 1 of the Sherman Act.

SECATORE'S, INC.
By its attorney,
ALBERT U. ROSA
Albert U. Rosa

Motion allowed as to 5th & 7th defenses, denied as to the 6th defense.

Nov. 16, '56 WYZANSKI

Hearing before Wyzanski, J.

[November 16, 1956.]

[2] The COURT. This is a hearing on a permanent injunction. The Court has already held a hearing in connection with a preliminary injunction, and on October 3, 1956 the Court entered an opinion with respect to the same, and on October 5 entered a preliminary injunction.

I now ask the plaintiff whether in addition to the evidence taken at the time of the hearing on the preliminary injunction, the plaintiff wishes to offer any other evidence?

Mr. BARTLETT. May I answer that this way, your Honor? Mr. Rosa suggested to me about the middle of last week that he has some amendments to his pleadings which he might like to file and ask your Honor to allow. And we made an effort to enter into a stipulation, with the caveat on my part that I would like to be heard as to whether certain of that stipulated evidence should go in. It is dependent on whether or not that is introduced, whether I will feel that I have further evidence.

Now, as a practical matter, your Honor, it is my understanding that Mr. Rosa does have further evidence, which I would like to rebut.

. . . . . .

[7] The COURT. I rule as a matter of law that the type of evidence which would be offered in connection with the sixth defense would be irrelevant, and therefore I will not permit the amendment of the answer to include the proposed sixth [8] defense. I have heretofore indicated that I will allow, and I now do allow, the motion with respect to the proposed fifth and seventh defenses.

Now that the pleadings are amended, do you wish to offer any evidence, Mr. Bartlett?

Mr. BARTLETT. That, your Honor, is dependent on your ruling on the matter of this stipulation.

The COURT. May I see the stipulation?

Mr. BARTLETT. Yes, sir.

[Conference at the bench.]

The COURT. All right, now, Mr. Bartlett, will you state whatever you want to state about these two letters of November 14, 1956 which you addressed to Mr. Rosa?

Mr. BARTLETT. There are various items of possible stipulation contained in those two letters, your Honor. The one to which we would like to address ourselves at the moment is number two on the second page of the letter.

The COURT. The longer letter?

Mr. BARTLETT. Yes, which does not contain the amounts.

The COURT. I will mark that Exhibit 1 for Identification, so that the record makes it clear what you are referring to. Plaintiff's Exhibit 1 for Identification is a letter on the letterhead of Ely, Bartlett, Thompson and Brown, dated November 14, 1956, addressed to Albert U. Rosa, Esq., [9]

18 Meridian Street, East Boston, Mass., and it consists of four pages.

Plaintiff's Exhibit 2 for Identification is a letter from the same firm to the same addressee on the same date. It is, however, two pages in length.

Mr. BARTLETT. Could Mr. Keresey address you on that subject, number two?

The COURT. Yes.

Mr. KERESEY. Your Honor, with regard to suggestion number two, I consider that the subject matter that would be brought out, namely, the dollar volume of commercial accounts in 1955, is immaterial with respect to either the fifth defense or the seventh defense. Once having those figures, whether in total or in the detail which the defendant is asking for, we still have nothing which bears upon either of these defenses.

At the previous hearing the facts were established that these deliveries to commercial accounts were tankwagon deliveries. Now, the fact that over a period of a year the total volume is X dollars appears to me to be immaterial as to whether they are wholesale sales or not.

The COURT. Anything else? All right, Mr. Rosa.

Mr. ROSA. Now, if your Honor please, at the previous hearing only one single isolated situation was developed, both because of lack of time and lack of information. It is the [10] contention of the defendant that it is only through the media of this testimony, or evidence, that the degree in area of competition between the plaintiff and the Esso dealers can be established. I know of no other way that it can be done.

The COURT. With respect to this matter, I am going to rule that this type of evidence set forth in Plaintiff's Exhibit 2 for Identification is relevant. I am therefore going to ask the parties whether they agree that, subject to the plaintiff's

objection to my ruling on relevancy, the facts are as stated in Plaintiff's Exhibit 2 for Identification.

Mr. BARTLETT. I do, your Honor.

Mr. ROSA. I do, yes, sir.

The COURT. I then admit Plaintiff's Exhibit 2 for Identification as Plaintiff's Exhibit 2. It constitutes the stipulation between the parties, but does not in any way preclude the plaintiff from challenging, either here at a later stage in final argument, or on appeal, my ruling with respect to relevancy.

[Plaintiff's Exhibit 2 for Identification received in evidence.] [Printed at A102-A104.]

. . . . . .

[14] Mr. BARTLETT. Referring to Plaintiff's Exhibit 1 for Identification, paragraph number 3 appearing on page 3 is a proposed stipulation—no, to shorten things up, your Honor, I do not object to that.

The COURT. You don't object to what is set forth in paragraph 3 on page 3 of Plaintiff's Exhibit 1 for Identification. And there being no objection, the parties agree that I shall admit as their stipulation that paragraph. And I do admit that portion of Exhibit 1 for Identification as Exhibit 1-A. You can put it right on the exhibit, it being paragraph 3 on page 3.

[Paragraph 3 on page 3 of Exhibit 1 for Identification received in evidence as Plaintiff's Exhibit 1-A.] [Printed at A102.]

The COURT. Now, as I understand it, the parties are in agreement that paragraphs 4, 5, 6 and 7 appearing on pages 3 and 4 of Plaintiff's Exhibit 1 for Identification are so related to the proffered sixth defense set forth in the defendant's motion to amend the defendant's answer, that my earlier ruling this morning that that sixth defense was ir-

relevant and would not be entertained by the Court is a ruling which I ought to apply to paragraphs 4, 5, 6 and 7, it being understood that defendant reserves its objection to this ruling, as it reserved its objection to my ruling on the sixth [15] defense of the motion itself. Is that correct?

Mr. ROSA. That is right.

Mr. BARTLETT. Yes, sir. Now, to answer your question, your Honor, as to whether I would like to offer evidence, the answer is in the affirmative in light of your ruling as to the contents of Exhibit 2 for Identification. I would like to call Mr. Doyle.

The COURT. Exhibit 2 for Identification is really now Exhibit 2.

Mr. BARTLETT. Well, is that the proper number? I understood the evidence in the previous hearing was in here for all purposes.

The COURT. The evidence in the previous case is evidence in this case, and if it will make it easier, I had better have Mr. Duwan tell me whether he used numbers at the last hearing.

Mr. BARTLETT. Well, the plaintiff's exhibits were A-1 through A-4, so I guess there is no reason why you shouldn't use number 2.

The COURT. There isn't any conflict in the numbers.

Mr. BARTLETT. No.

JOHN A. DOYLE, *Sworn*

Direct Examination by Mr. Bartlett

Q. Your full name, sir? A. John A. Doyle.

[16] Q. You live where? A. 208 Rutledge Road, Belmont, Mass.

Q. And your employment is what? A. Division merchandising manager.

Q. Of—? A. Esso Standard Oil Company.

Q. You are located here in Boston? A. Yes.

Q. And the division you refer to is— A. The New England division.

Q. The New England Division of Esso Standard Oil? A. Yes.

Q. How long have you been a division manager? A. Seven years, approximately.

Q. Let's turn this around, Mr. Doyle, in the matter of your experience with the company and ask you, what was your first experience in the oil business? A. As a service station attendant.

Q. When was that? A. In 1923.

Q. Was that for Beacon Oil Company? A. That was for Beacon Oil Company.

Q. After finishing as service station operator, what did you then do? A. I was assistant service station supervisor.

[17] Q. Still with Beacon Oil? A. Beacon Oil Company.

Q. And what was your next position? A. Service station supervisor.

Q. What date are we at now? A. I think '24 or '25.

Q. And your next position? A. Assistant district manager in the Massachusetts district.

Q. And how long did you continue with that? Through what year? A. Approximately '27.

Q. And your next position with the company? A. Assistant superintendent of service stations for the New England division.

Q. That went through when? A. 1933.

Q. And thereafter? A. Assistant retail division manager, New England division.

Q. Through when? A. 1936.

Q. And thereafter? A. District manager in the Massachusetts district.

Q. Through when? A. 1936, January 1st.

The COURT. I don't know whether you are of the view that I am going to allow testimony which reaches very far back [18] in the past, or whether you are trying to qualify Mr. Doyle as an expert. Or what is your object?

Mr. BARTLETT. I am trying to qualify Mr. Doyle as one who has vast experience in the oil business.

The COURT. I think it will be agreed that he is a man of vast experience.

Mr. ROSA. It is, your Honor.

Mr. BARTLETT. I would kind of like to have you hear me out.

The COURT. All right.

Q. And your next position? A. Merchandising manager, in January 1950.

Q. Through the present time? A. Yes.

Q. Mr. Doyle, is it a fact that Mr. Harding, who testified at the previous hearing in this case, is now in the hospital and unavailable? A. Yes.

Q. Now, I direct your attention to the so-called commercial accounts of the company. Did you attend the previous hearing, Mr. Doyle? A. I did.

Q. Concerning which there was testimony at the previous hearing. In a broad and general way, could you tell us the type of business activity in which these commercial accounts [19] are engaged? A. Commercial accounts include industrial and manufacturing companies, it includes the transportation companies, truckers, fleet operators, including dairy, grocery companies, and the like, public bus lines and taxicab accounts.

The COURT. Have you actually a list of all these customers?

Mr. BARTLETT. Well, I hadn't intended to offer it, your Honor. I merely wanted a general picture of the type of activity that they were in. For competitive reasons if for no other, I would prefer not to offer it.

Q. Now, with these commercial accounts it is a fact, is it not, that deliveries to them are solely by tankwagon? A. That is correct.

Q. And in each instance the commercial account has on its premises dispensing equipment, pumps? A. Yes.

Q. Could you tell us the uses to which the gasoline is put in these typical cases which you have mentioned?

Mr. ROSA. I pray your Honor's judgment.

The COURT. Well, I assume he is going to tell me some uses other than motor vehicle uses. Is that what you are going to get from this witness?

Mr. BARTLETT. That is what I have in mind.

The COURT. I will allow that testimony in the most [20] general form.

The WITNESS. In addition to motor vehicle use, plants use gasoline for their gasoline motors in their plants, and in some cases for unregistered mobile equipment on the premises.

Q. By unregistered, are you referring to such things as lift trucks, and so forth? A. Lift trucks, and even trucks that do not move from the premises on to the highway.

Q. Directing your attention again to the commercial accounts, does the company have certain items of expense in doing business in this manner, that is by taking tankwagon deliveries and dispensing its own gas?

Mr. ROSA. I pray your Honor's judgment.

The COURT. This seems to me merely corroborative of what was shown in the first hearing and referred to in the opinion of the Court. But if you have some special kind of additional class of expense which was not previously re-

ferred to, I am not going to stop you from following this line of inquiry.

Mr. BARTLETT. I thought for the record that specifically—these items were not specifically covered, I think they were covered in part, and I do have some additions.

The COURT. All right, you may cover them.

Mr. BARTLETT. Could I have the question, please?

The COURT. The question is, what other types of [21] expense does the commercial account have beyond the cost of gasoline?

The WITNESS. The account has the cost—first he has the investment in the product, he has the expense of dispensing that gasoline into his equipment, the expense with reference to receipt cards of the product, some expense with reference to permits, then the expense of control of the product, keeping records, and so forth, and the possible expense as far as insurance is concerned.

Q. And these pumps are located on the premises of these various commercial accounts? A. Yes.

Q. And take up a certain area, I assume? A. Yes.

Q. I think this was touched on at the previous hearing, but I believe there was evidence to the effect that in many, if not in all cases, the Esso Standard Oil Company loans equipment to these commercial accounts? A. Yes.

Q. So in those instances there is no expense other than as lessee, as far as the pumping is concerned? A. Yes.

Q. What are the advantages that accrue to the commercial customer by doing business in this manner? A. The advantage to the customer is first convenience, [22] availability of the product on the premises, and secondly a better control of cost factors.

Q. And taking it across the board, the typical case in commercial accounts, what is the size of the storage facilities on his premises, in gallons? A. Storage at a commercial account might vary from 2,000 to 15,000 gallons.

Q. This is delivered in tank trucks, and what are the capacities, what is the range of capacity of the tank trucks? A. Tank truck capacities range from 3500 to 6,000 gallons.

Q. And can we there again strike off a typical cross section average? A. The average is about 4500 gallons.

Q. Now, have you made some effort to ascertain, apart from your general knowledge of the subject, Mr. Doyle, the average size of delivery to commercial accounts? A. We have.

Q. And what is it? A. The average size of delivery to commercial accounts for the year 1955 was 1459 gallons.

Q. Maybe that isn't the proper way to attack it. From your experience, can you tell us the typical or the usual delivery? A. The usual delivery of gasoline to commercial accounts is about 1500 gallons.

Q. In some instances there are small deliveries? [23] A. Yes.

Q. And you would consider a small delivery as what? A. Small deliveries might—are usually emergency deliveries.

Q. And in amount? A. As low as 300 gallons, but very rarely below 600.

Q. Taking the other side of the picture, I would assume that the maximum is the capacity of your largest truck, that is, 6,000? A. Yes.

Q. Is it a fact that the other refining and marketing gasoline companies in this area also do business in a smiliar manner with commercial accounts?

Mr. ROSA. I pray your Honor's judgment.

The COURT. Irrelevant. Excluded.

Mr. BARTLETT. May I make an offer of proof, your Honor?

The COURT. What is the relevance?

Mr. BARTLETT. I would like to show, your Honor, an industry practice to do business in this manner with these

commercial accounts, which I think has some bearing on the distinction between retail and wholesale. I would like to show merely that the other companies do the same thing.

The COURT. I don't see why that is any more relevant than if other companies did the same thing as McKesson & Robbins do.

[24] Mr. BARTLETT. This, your Honor, is a question of a definition of a word.

The COURT. You may make your offer of proof.

Mr. BARTLETT. I offer, if your Honor please, to show that the other companies, refining and marketing companies in Massachusetts, some 10 in number, also have commercial accounts and do business in a manner, and largely to an extent, that Esso Standard Oil Company does.

Now, one thing further, and this is apart from the offer, your Honor; I had intended to show through Mr. Doyle that there are also independent jobbers that do the same thing to a greater or lesser extent, but I would assume that comes within the ruling.

The COURT. I am going to maintain my ruling that this is irrelevant, but I wonder whether Mr. Rosa would agree that the facts are as stated, if they are relevant.

Mr. ROSA. No, your Honor, I would not.

The COURT. My ruling is the same. It is irrelevant.

Mr. BARTLETT. And, your Honor, I would offer to prove that commercial accounts are served also by independent jobbers.

The COURT. I will allow you to show anything with respect to retail gasoline stations supplying such accounts.

Mr. BARTLETT. I will now touch upon the activity of retail gasoline stations.

[25] Q. Mr. Doyle, we are taking the typical gasoline filling station. In that instance, their sales of gasoline are to whom and in what amounts? A. Sales of gasoline at a service station are made into motor vehicles; the average

delivery of which is seven and a half gallons per delivery.

Q. And the tank capacities of the ordinary customer, taking automobiles first? A. Approximately 20 gallons.

Q. And a truck takes what? A. Trucks without so-called saddle tanks have a truck capacity from 20 to 30 gallons. Overland trucks with special saddle tank facilities have a capacity up to 120 gallons.

Q. Now, this typical gasoline filling station has other products than gasoline, correct? A. Yes.

Q. Such as what? A. Motor oils, greases, tires, batteries, and accessories.

Q. Does it have certain services that it renders? A. It does.

Q. Such as what? A. Car lubrication, fire service, car washing.

Q. In profit can you tell us the percentage of gasoline sales as against the total business of this typical station?

Mr. ROSA. I pray your Honor's judgment.

[26] The COURT. Irrelevant.

Q. Can you tell us, Mr. Doyle, the average volume per year in gallonage of this typical station?

Mr. ROSA. I object, if your Honor please.

Mr. BARTLETT. Your Honor, that is on the same subject as the stipulation Mr. Rosa wanted in.

The COURT. I am going to allow the answer, because it is conceivable that the answer might be relevant. I don't believe it is going to turn out to be.

The WITNESS. Sales of gasoline at the average service station are 200,000 gallons per year.

Q. And a large volume station runs to what? A. It might run to better than a million gallons.

Q. Is it a fact that as with the commercial account, with the typical service station the equipment, the pumps, are leased or loaned?

Q. By the supplying company? A. Yes.

Q. Esso fair trading began when, Mr. Doyle? A. August of 1956, August 8th.

Q. Since that time has Esso obtained any new commercial accounts which were not already serviced by other suppliers and in which there was an installation of equipment involved?

Mr. ROSA. I object.

The COURT. Well, the form of the question is such [27] that I don't know what lurks within it, and I am going to require it to be broken down.

Q. Has Esso obtained any new commercial accounts since August 8, 1956? A. Yes.

Q. And in that instance—?

The COURT. Well, now, how many?

Q. Do you know? A. In the Commonwealth of Massachusetts?

The COURT. That is all.

The WITNESS. Four.

Q. And—? A. I would like to qualify that to make it approximately four, maybe three or five, I haven't checked that.

Q. And in any instance was it one in which the customer did not already have pumps on his location?

Mr. ROSA. Well, your Honor—

The COURT. I will allow the answer. In each instance did the customer have pumps already on his location?

The WITNESS. He did.

Q. And was it or was it not a fact that the supplier prior to Esso was another manufacturing company?

Mr. ROSA. I object to that.

The COURT. He may answer that.

The WITNESS. Yes.

[28] The COURT. Well, am I to understand that the meaning of this last answer is that you succeeded competitively in converting a customer from a rival to yourself?

The WITNESS. That is correct.

The COURT. And in each case the previous supplier was not a gasoline station, but was in some other aspect of the business; is that right?

The WITNESS. Yes.

The COURT. In what aspect was the other supplier?

The WITNESS. The other supplier was delivering to the account on a tankwagon basis.

The COURT. Was it a jobber, or what was it?

The WITNESS. It was a refining and marketing company.

The COURT. And not a jobber?

The WITNESS. Not a jobber.

Mr. BARTLETT. That is all.

Cross-examination by Mr. Rosa

XQ. You told us, Mr. Doyle, that Esso owns or leases tanks and pumping equipment to commercial accounts? A. Yes.

XQ. And it also maintains that equipment, does it not? A. Yes.

XQ. At its own expense? A. Yes.

XQ. And you have told us that in the category of commercial [29] accounts are included industrial and manufacturing companies. Do you carry such a thing as an industrial account? A. Yes.

XQ. Would the industrial account apply to these industrial outfits that you spoke of? A. Yes.

XQ. So that they are not included in commercial accounts, are they? A. They are.

XQ. Well, do you have a separate and distinct designation for industrial accounts? A. No, not as far as gasoline sales are concerned.

XQ. So that what you call an industrial account is the

sale of something other than gasoline? A. The terminology of an industrial account in the industry is where we sell them industrial lubricants and so forth.

XQ. Now, I think it has been said here previously that there are 344 commercial accounts, if my memory is correct; is that right?

The COURT. There would be more now, wouldn't there?

The WITNESS. There are actually 455 commercial accounts.

The COURT. In Massachusetts now?

The WITNESS. In Massachusetts.

XQ. Now, you told us that the use of gasoline in some of these commercial accounts is for the use of unregistered mobile [30] equipment? A. Yes.

XQ. How many of the 455? A. I wouldn't know that.

XQ. You have no idea at all? A. No.

XQ. But the vast majority, it is fair to say, of these commercial accounts is for the use of registered mobile equipment; that is right, is it not? A. Yes.

XQ. Now, you told us that some of this gasoline was used in industrial plants and gas motors. That is an infinitesimally small part of the gasoline sold to commercial accounts, is it not? A. Yes.

XQ. How many accounts, offhand, do you know that have gas motors, of the 455? A. I don't know.

XQ. By that you mean you don't know of any? A. No, I don't know how many.

XQ. Do you know of any? A. Yes.

XQ. How many do you know of? A. I don't know that I could say. Half a dozen, possibly.

XQ. And are those accounts big accounts or small accounts? [31] A. Those accounts are usually big accounts.

XQ. Well, not usually. We are talking about these parti-

cular accounts. A. Yes, they are big accounts, where this is a portion of their total business.

XQ. And what kind of equipment do they have? A. They have, oh, fork lift trucks, trucks on the premises, gasoline motors.

XQ. Can you give us by name one account to give us a typical example of them? A. I couldn't give you a name.

XQ. You mean you are unable to? A. Yes.

XQ. You don't know of any one specific account and what equipment they have? A. I don't. I haven't that information.

XQ. You don't have that information? A. That is right.

XQ. So that when you tell us that some of this gasoline that is sold to commercial accounts is for the use of mobile equipment, you don't know that as a fact, do you? A. I know it is a fact. I would have to check my records to find out what the accounts are and what the equipment is.

XQ. But you don't know of any specific situation? A. I don't.

[32] XQ. Just generally you feel that some of it might be used for that purpose; is that right? A. I know that some of it is used for that.

XQ. In any event, if any of this gasoline that is sold to commercial accounts is used for that purpose, it is fair to state that it is less than one per cent of the total gasoline sold to commercial accounts? A. It would be a small percentage.

XQ. Less than one per cent? A. I don't think so.

The COURT. I don't think you have to pursue this point much further. I realize it is de minimus.

XQ. Now, you told us about the cost to the commercial account, the items of expense that they have to carry, and one of them you said was the cost of the investment in the product; is that right? A. Yes.

XQ. And by that you mean that they have to invest money in the inventory? A. Right.

XQ. Well, as a matter of fact, you sell to commercial accounts on credit, do you not? A. Some of them.

XQ. The vast majority you sell on credit, do you not? A. Not the vast majority.

[33] XQ. Well, do you mean to tell me that the Esso Company would undergo the expense of installing equipment to a commercial account who had a poor credit rating; is that what you want to tell us? A. No, I don't want to tell you that.

XQ. So that in the vast majority of the commercial accounts, their purchases are paid by credit; that is right, isn't it? A. Much of our commercial business is on a cash basis.

XQ. How much of your commercial business is on a cash basis? A. I don't know.

XQ. Well, in any event, some of your commercial business for gasoline is sold on credit? A. Yes.

XQ. So that at least in those situations where the gasoline is sold on credit, there is no investment in inventory; that is right, isn't it? A. That is right.

XQ. So that in those situations, that particular account is somewhat better off than the automobile driver who pulls into a gas station and buys 10 gallons of gas; that is right, isn't it? A. Yes.

XQ. Because that driver pays cash usually to the gas station? A. Not necessarily.

XQ. But usually?

The COURT. More frequently than not.

[34] The WITNESS. Yes.

XQ. Then you told us that another expense to the commercial account was the cost of dispensing the gasoline; is that right? A. Yes.

XQ. And by that you mean that they have to take an

employee or somebody to operate or man the pump to fill the tank? A. Yes.

XQ. That is what you meant by that, the time that it took? A. Yes.

XQ. For a man to do that? A. That is right.

XQ. Well, assuming that the person is driving a truck and pulls into a gas station and buys 20 gallons of gasoline, he waits for the gasoline attendant to fill the tank, does he not? A. Yes.

XQ. And it takes the same amount of time, whether the tank of 20 gallons is filled in the gasoline station or in the plant; that is right, isn't it? A. That is right.

XQ. So that the same amount of time of a man is consumed, whether he presses the trigger on the tank or whether somebody else does it for him; that is right, isn't it? A. At a commercial account—

XQ. No, please. That is right, isn't it? A. That is right.

[35] XQ. So that the cost in so far as that particular item is concerned is the same, whether it is from the commercial account's tanks or from the dealer's tanks; that is right, isn't it? A. No.

XQ. You say it isn't? A. No, it is not so.

XQ. Well, in what way is it different? A. Because many commercial accounts, in addition to the driver, have a special man for dispensing the gasoline into the truck.

XQ. But that is an elective proposition in so far as the commercial account is concerned; that is right, isn't it? A. Yes.

XQ. They prefer to have an extra man. But in so far as the cost is concerned, in the ordinary situation, the cost to the purchaser from the standpoint of time is the same whether he pumps his own gas or somebody else pumps it for him; that is right, isn't it? A. That is right.

XQ. Now, you say that the question of control of the product is an item of cost; is that right? A. Yes.

XQ. And by that you mean what, sir? A. I meant particularly having to do with stock losses and variations.

XQ. Well, if there was dishonesty, wouldn't that be the same to [36] the person that drives the company truck into the gas station and buys 20, 30 or 40 gallons of gas? A. No, I meant having to do particularly with evaporation, and that is characteristic of gasoline.

XQ. Well, of course, that is a two-edged sword, is it not? Evaporation, shrinkage, is a two-edged sword? A. I don't know what you mean.

XQ. Well, there are times of the year when there is shrinkage, and there are times of the year when there is expansion; that is right, isn't it? A. Yes.

XQ. So that that balances out, does it not? A There is a stock loss feature in addition to evaporation, that if the product is not maintained efficiently, the equipment, and in dispensing the gasoline into trucks, much gasoline can be lost.

XQ. But in so far as the maintenance of the equipment is concerned, Esso does that? A. I didn't mean with reference to the maintenance of equipment. I meant with reference to the handling of the product itself. That goes beyond the condition of the equipment.

XQ. And by that you mean what? In the handling of the products? Spillage? A. Spillage, sloppage, and so forth.

XQ. Now, what is the average-storage capacity of a commercial [37] account? A. Storage will vary from 2,000 gallons up to 15,000 gallons.

XQ. That is a decision that Esso makes in the installation? A. That decision, much of it, rests with Esso Standard. Some of it depends upon the permit possibilities.

XQ. You have some commercial accounts where the stor-

age capacity is substantially less than 1500 gallons; do you not? A. I don't know of any.

XQ. Now, you told us that Esso acquired four new accounts since the invoking of fair trade. Were those accounts that you say were supplied by other suppliers? A. Yes.

XQ. Were those previous suppliers on fair trade? A. I don't know.

XQ. Now, besides gasoline Esso markets in Massachusetts many other products? A. Yes.

XQ. Among which are oils and greases, batteries, tires and accessories; is that right? A. Yes.

XQ. Now, at the previous hearing it was stated that the total sales of Esso in 1955 in Massachusetts were approximately $32,211,000; is that right? A. Yes.

XQ. And that figure includes, besides gasoline, the sales of [38] accessories, greases and oils? A. No, that figure, I understood, applied to the value of the gasoline only.

XQ. No, not as you understood it, sir. My question to you is, does the figure $32,211,000 worth of business in 1955 include the sale of oils, greases and accessories? A. It does not.

XQ. You now want to leave it that that figure is only for the sale of gasoline; is that right? A. Yes.

XQ. Can you tell us whether or not that includes the sales of Esso Golden or Golden Esso? A. Yes.

XQ. Can you tell us approximately the total dollar volume of sales of Golden Esso in 1955? A. In 1955 there were not Golden Esso Extra—as a matter of fact, I would like to correct my statement; that figure did not include Golden Esso Extra, because we did not have the product during that period.

XQ. You have salesmen on the road soliciting commercial accounts? A. Yes.

XQ. In Massachusetts? A. Yes.

Mr. ROSA. I think that is [39] all.

Redirect Examination by Mr. Bartlett

Q. Just one question, Mr. Doyle. You stated that the number of commercial accounts in Massachusetts was 455, and that was for the year 1955; is that correct? A. Yes.

Q. And that, as contrasted with the number previously given of 344, was as a result of further check by you? A. Yes.

Mr. BARTLETT. That is all.

Re-cross-examination by Mr. Rosa

XQ. In each of these localities where commercial accounts are situated, there are in the vicinity Esso dealers? A. Yes.

Mr. ROSA. That is all.

Mr. BARTLET. That is all. That is the plaintiff's case, your Honor.

The COURT. Mr. Rosa?

Mr. ROSA. Mr. Secatore, please.

FRANKLIN SECATORE, *Sworn*

Direct Examination by Mr. Rosa

Q. What is your name? A. Franklin Secatore.

Q. And are you an officer of the defendant corporation? A. Yes, sir.

Q. What office do you hold? [40] A. Treasurer.

Q. Since the last hearing have you had occasion to buy gasoline from Esso dealers other than your own stations? A. Yes, I have.

Q. When did you make your first purchase? A. November 7.

Q. And where was that? A. That was in Concord.

Q. And whereabouts in Concord? A. On Route 2.

Q. And what did you buy? A. I bought nine gallons of Esso.

Q. And at that time, on the date you mentioned, the minimum resale price was what? A. The minimum resale price was 26.9.

Q. And what was the posted price there? A. 27.9.

Q. How much did you pay for the nine gallons of gasoline? A. $2.32.

Q. And did you compute that as to how much a gallon you paid for the gas? A. I paid 25.9.

Q. And did you receive anything from the dealer? Did you receive any stamps? A. No stamps.

[41] Q. And was that reduction in price at your request, or did he merely ask you for the amount you paid him? A. No request. In this particular case there was no request made.

Q. When next did you have occasion—?

Mr. BARTLETT. Pardon me just a second.

[Conference between counsel.]

Q. When next did you shop an Esso dealer?

[Discussion off the record.]

[At this point the case was recessed until 9.30 a.m. Wednesday, November 21, 1956.]

Hearing before Wyzanski, J.

[November 21, 1956.]

[2] The COURT. Gentlemen, since the last hearing have you entered into a stipulation?

Mr. BARTLETT. Yes, your Honor. I have a stipulation signed by both counsel, covering the subject of enforcement, which I would like to file.

The COURT. The stipulation is received. According to my record this is the first stipulation. It may be received and marked as Stipulation No. 1.

I should like to congratulate counsel on the detail, clarity and balanced picture in these stipulations. I doubt whether in any case I have ever seen a better stipulation, more expeditiously prepared. Is there any other testimony that is to be offered on this topic beyond the stipulation?

Mr. BARTLETT. No, your Honor.

Mr. ROSA. On that topic, no, your Honor. I have some additional testimony to offer. At this time may I say Mr. Bartlett and I have agreed that the sales of gasoline are sales made in interstate commerce. Mr. Secatore, will you take the witness stand, please?

FRANKLIN SECATORE, *Sworn*

Direct Examination by Mr. Rosa

Q. Your name is Franklin Secatore? A. That is right.

[3] Q. You were previously sworn? A. That is right.

Q. Now how long have you been connected with the gasoline retail business? A. Twenty-eight years.

Q. During that time have you managed and operated two gasoline stations? A. That's correct.

Q. At some time in the last few years you formed a corporation and the corporation now owns a gasoline station, is that right? A. That is right.

Q. Now in 1955 what was the gallonage of your two stations? A. Over two and a half million.

Q. In the course of the operation of these gasoline stations does the defendant sell gasoline to fleets? A. We do.

Q. Of motor vehicles? A. We do.

Mr. BARTLETT. I'm sorry.

Mr. ROSA. Does the defendant sell gasoline to fleets of motor vehicles?

Q. Your answer? A. Yes, we do.

Q. How many fleet accounts does the defendant have? [4] A. This is for the year 1955?

Q. Right. A. We had 45.

Q. And can you tell us the gallonage of the largest account? A. 42,000.

Q. That was 42,000 gallons sold to a single account in 1955? A. That is right.

Q. How many accounts does the defendant have between 5,000 and 10,000 gallons per year? A. Eleven.

Q. And how many accounts between 10,000 and 20,000 gallons a year? A. Nine.

Q. And how many accounts—

The COURT. Nine, between 10,000 and 20,000? They are nine additional accounts beyond the eleven you have already mentioned? Right?

The WITNESS. That's right.

Q. How many accounts between 20,000 and 30,000 gallons per year? A. Seventeen.

Q. How many accounts between 30,000 and 40,000 gallons per year? A. Eight.

Q. How many employees does the defendant have in the operation [5] of these two gasoline stations? A. We average 35.

Q. Are these two gasoline stations equipped so as to handle fleet accounts of 100,000 gallons or more? A. Yes, sir.

Q. From your experience in the retail sale of gasoline, have you an opinion as to whether the average Esso dealer is equipped to handle accounts of 100,000 gallons per year?

Mr. BARTLETT. I will have to object, your Honor.

I was a little doubtful about the first question, I really do not know what he means by "equipped."

The COURT. Will you tell me what you understand by the words "equipped to handle"?

Mr. ROSA. He has the facilities to sell those accounts.

Q. Whether or not the average Esso dealer has the facilities to sell accounts of 100,000 gallons a year?

The COURT. Has he?

The WITNESS. Yes, sir.

Q. So that in your opinion any of the average Esso dealers could sell and handle fleet accounts up to 100,000 gallons a year? A. Yes, sir.

Q. Are your stations, or the stations of the defendant, equipped and do they have the facilities to sell accounts, [6] large accounts, of 100,000 gallons a year or better? A. Yes.

Mr. BARTLETT. He has answered?

The COURT. Yes, he has answered it previously.

Q. How many pumps do you have in the Day Square station? A. Twelve.

Q. What is the total gallonage for storage facilities? A. 12,000.

Q. And is it the same at the Waldemar station? A. Yes, sir.

Q. Will you tell us something about how gasoline is delivered and sold? It is delivered to the station by tankwagon? A. Tankwagon.

Q. And where does it go from there? A. It goes into the tanks which are underground.

Q. And how is it dispensed? A. It is pumped out by the individual pumps.

Q. And from the pumps it goes into the tank of a motor vehicle? A. Of vehicles.

Q. And whether or not there are any markings on the pump? A. Yes, sir.

Q. And what markings do the pumps have? A. The type of gasoline which is dispensed from that, like Esso, Extra or Golden.

Q. One other thing, from the pump to the tank of the automobile [7] or motor vehicle, there is a hose that delivers the gasoline into the tank? A. A flexible hose.

Mr. ROSA. I think that is all.

Cross-examination by Mr. Bartlett

XQ. Mr. Secatore, at these two stations, Day Square and Waldemar, you have other services that you render, other than merely the sale of gasoline, do you? A. Yes, sir.

XQ. Do you sell accessories such as tires and so forth? A. Yes, sir.

XQ. Do you do any servicing at these two stations? A. Servicing.

XQ. By servicing I mean like oil and greasing? A. Oiling and greasing, yes, sir. No service work or repair work.

XQ. No repair work? A. No repair work. Oiling and greasing, yes, sir.

XQ. In the instance of all of these so-called fleet accounts that you refer to, delivery is made from the pump at your station whether it be at Day Square or Waldemar? A. Correct.

XQ. And no delivery is made from you by tankwagon? A. No, sir.

[8] XQ. You mentioned the number of pumps at your two stations. In your instance, Mr. Secatore, are those pumps leased or owned by you? A. They are owned by Esso.

XQ. You lease them from Esso? A. We don't lease them, they are owned by the lease. You would have to pay for them. We pay nothing for them and they are property of Esso Standard Oil Company.

XQ. Now you say that other dealer stations are equipped to handle—

The COURT. Louder.

XQ. —the gallonage that you have mentioned, correct? A. That is right.

XQ. It is a fact, is it not, Mr. Secatore, in all due modesty, that your station, your stations are very large volume stations, are they not? A. I don't know.

XQ. Well— A. I don't know what the other stations do, in gallonage.

XQ. Well now, Mr. Secatore, you are familiar with your neighbors in the business, are you not? A. Yes, sir.

XQ. You live in Sudbury? A. Yes, sir.

XQ. And you are familiar with the stations on the route to [9] Sudbury? A. Certainly.

XQ. And generally you are familiar with the stations, the type of stations in the Greater Boston area, are you not? A. Surely.

XQ. Now in all fairness, in contrasting your stations with the average filling station in the Metropolitan area, wouldn't you say that your two stations are very large gasoline stations? A. It all depends on what you call Metropolitan Boston. If you mean East Boston where my stations are located, no, sir. Metropolitan Boston, yes, sir.

Mr. BARTLETT. May that go out, your Honor?

The COURT. I think it is perfectly comprehensive.

XQ. The answer is Yes, in Metropolitan Boston? A. In Metropolitan Boston.

XQ. And by stating that your station and other dealer stations are equipped to handle the so-called fleet account, you mean that they have the storage in the ground and they have the pumps to pump the gasoline into the item, into the unit of the fleet that comes into the station? A. Yes, sir.

Mr. BARTLETT. I believe that is all.

Mr. ROSA. That is all. The defendant has no further testimony, if your Honor pleases.

The COURT. I am going to ask you, Mr. Rosa, whether [10] you haven't anybody else in the court room other than Mr. Secatore, who can testify with respect to how many large accounts a gasoline service station has.

Mr. ROSA. I do not, your Honor. Those are trade secrets that you cannot get out of them, different dealers.

The COURT. The defendant rests?

Mr. ROSA. The defendant rests.

The COURT. The plaintiff?

Mr. BARTLETT. Yes, your Honor.

The COURT. I will now listen to argument by you gentlemen. . . .

. . . . . .

[33] The COURT. Is there anything else, gentlemen?

[No response.]

I vacate the temporary injunction forthwith. I shall file an opinion with respect to the permanent injunction shortly.

My reasons for vacating the temporary injunction is that, as at present advised, I find that the plaintiff is in competition with gasoline service stations, and does not fall within the exemption provision of the McGuire and Miller-Tydings Acts.

The uncontradicted evidence shows that even a single retail gasoline station in Massachusetts has 45 accounts of more than 5,000 gallons per year and this is in direct competition with the commercial accounts of the plaintiff. Differences in methods of sales seem to be infinitesimally less important in determining whether there is competition than the other factors, such as quantities and types of customers.

The opinion on the other phases of the case will follow as soon as can be. The injunction dissolution is effective forthwith.

Mr. BARTLETT. If your Honor please, to the extent that I have the burden of excepting to your present order, I would like to make the exception.

The COURT. Yes.

[Adjourned.]

PLAINTIFF'S EXHIBIT 1-A.

EXCERPT FROM LETTER OF NOVEMBER 14, 1956, FROM ELY, BARTLETT, THOMPSON & BROWN TO ALBERT U. ROSA

. . .

3. The pumps and service equipment of commercial accounts supplied by Esso Standard Oil Company are at greater or lesser distances from retail service stations selling Esso and Esso Extra motor fuels. There is no set pattern or relationship between the location of the pumps and service equipment of a commercial account and the location of a retail service station selling Esso and Esso Extra motor fuels.

. . .

PLAINTIFF'S EXHIBIT 2.

ELY, BARTLETT, THOMPSON & BROWN
294 WASHINGTON STREET
BOSTON

(COPY)

November 14, 1956.

Albert W. Rosa, Esquire
18 Meridian Street
East Boston, Massachusetts

Re: Esso Standard Oil Company
vs. Secatore's, Inc.

Dear Mr. Rosa:

I am separately setting forth for your personal information the 1955 dollar volume figures for sales of Esso and

Esso Extra motor fuels by Esso Standard Oil Company to its commercial accounts in Massachusetts. In accordance with our conversation of today, you understand that this information is confidential.

(a) Total dollar volume of commercial accounts in 1955: $3,345,702.28

(b) Total dollar volume of sales to commercial accounts using less than 5,000 gallons per year: $77,-561.00

(c) Total dollar volume of commercial accounts using between 5,000 and 10,000 gallons per year: $161,-881.48

(d) Total dollar volume of commercial accounts using between 10,000 and 15,000 gallons per year: $167,-285.13

(e) Total dollar volume of commercial accounts using between 15,000 and 20,000 gallons per year: $119,-410.76

(f) Total dollar volume of commercial accounts using between 20,000 and 25,000 gallons per year: $71,-851.25

(g) Total dollar volume of commercial accounts using between 20,000 and 30,000 gallons per year: $120,-735.37

(h) Total dollar volume of commercial accounts using between 30,000 and 40,000 gallons per year: $115,-991.30

(i) Total dollar volume of commercial accounts using between 40,000 and 50,000 gallons per year: $166,-966.58

(j) Total dollar volume of commercial accounts using between 50,000 and 75,000 gallons per year: $234,-711.43

(k) Total dollar volume of commercial accounts using

between 75,000 and 100,000 gallons per year: $142,-394.77

(l) Total dollar volume of commercial accounts using in excess of 100,000 gallons per year: $1,966,913.21

All of the above dollar figures include Federal and State taxes of 7¢ per gallon.

Very truly yours,

CWB:g CHARLES W. BARTLETT

Stipulation.

It is stipulated by the parties as follows:

A. On Behalf of the Defendant

Unless otherwise shown, the price posted was the plaintiff's minimum retail fair trade price.

November 5, 1956 an agent of the defendant shopped the station located on 1763 Revere Beach Parkway, Everett. The agent purchased Esso gasoline and was charged a total amount which resulted in a discount of 1¢ per gallon.

November 5, 1956 shopped at J. Camillieri. Purchased 5 gallons. Paid $1.35 and received 14 stamps.

November 5, 1956 shopped at Highland & Mystic Avenue, Somerville. (Yannizzi) No discount.

November 5, 1956 shopped Esso, Wellington (Turner) no discount.

November 5, 1956 shopped O'Connell (no discount).

November 6, 1956 shopped Lansky, Mattapan—7.8 gallons, paid $2.10 received 21 stamps.

November 7, 1956 shopped Louie's, Roxbury—received 2¢ discount.

November 7, 1956 shopped Douglas Whitehouse, Saugus—bought 7.1 gallons—paid $1.90 received 20 stamps.

November 7, 1956 shopped Kane's Esso, Peabody—no discount.

November 9, 1956 shopped Bradley's, Roxbury—received 1¢ discount.

November 9, 1956 shopped Eastern Avenue, Lynn—purchased 5 gallons at minimum retail price.

Rotary Shell, Eastern Ferry, Malden—5 gallons—14 stamps.

Shopped Frank J. Penza, Summer St., So. Boston—bought 5 gallons at pump price 26.9 gallons—received 14 stamps.

Shopped Phillip Harol, Jamaica Plain—5 gallons at pump price 26.9—received 11 stamps.

Shopped Pete's Esso, Roxbury—bought 4.6 gallons at pump price of 24.9 a gallon. (The defendant's evidence would indicate that this station was posting less than the plaintiff's minimum fair trade price for a period of three weeks prior to November 15. The plaintiff's evidence would indicate that such posting was for a period of 13 days.)

Shopped Davis Esso, Dorchester—no discount.

Shopped Marty's, Mass. Ave., Roxbury—no discount.

Shopped Neil Moriarty, Dorchester & Savin Hill Ave. —no discount.

Shopped King's Service Station, Charlestown—bought 5 gallons at pump price of 26.9¢—received 13 stamps.

Shopped Vin Turco, Chelsea—bought 7.4 gallons pump price 26.9¢—pump read $1.98, took $1.87.

Shopped Ernie's Esso, Allston—bought 11 gallons—pump price 26.9¢—pump read $2.95 less 22¢ discount paid $2.73.

Ernies, 154 Ferry Street, Malden—2¢ less a gallon than the minimum retail price.

Shopped Renado, Revere—bought 12 gallons—pump price 26.9¢—pump read $3.23—13¢ discount—paid $3.10.

Charles F. Kane, Saugus—22¢ discount—paid $2.88.

Shopped Dan's Esso Station—Malden—bought 11 gallons—pump price 26.9¢ paid $2.75.

November 14, 1956—Michaud Bros., Salem—pump price 27.9¢—bought 9.2 gallons—tank price $2.57—paid $2.35—1¢ discount.

Shopped Esso Service Center, Salem—bought 5 gallons—pump price 27.9¢—paid $1.30—2¢ discount.

Shopped Earl's Esso Station, Lynn—bought 5 gallons—pump price 26.9¢—paid $1.25—2¢ discount.

Shopped John Chisholm, Lynn—bought 4.8 gallons—pump price 26.9¢—pump read $1.30 –paid $1.25—1¢ discount.

Shopped Warren Garage, Lynn—7 gallons purchased—pump price 26.9¢—tank read $1.93—paid $1.79—2¢ discount.

Shopped Hurley's, Lynn—purchased 5 gallons—pump price 26.9¢—paid $1.25—2¢ discount.

Shopped McDuff's, Lynn—5 gallons purchased—pump price 26.9¢—paid $1.30—1¢ discount.

Shopped L. Young, Lynn—5 gallons purchased—pump price 26.9¢—tank read $1.33—paid $1.23—2¢ discount.

Shopped Bob Brown, Point of Pines, Revere—no discount.

Shopped Marty's, Lynn—no discount.

November 15, 1956 shopped Joseph Howard, Somerville,—13.4 gallons purchased—pump price 26.9¢—paid $3.34—2¢ discount.

Shopped Park Tire Co., Boston—bought 5 gallons—pump price 26.9¢—tank read $1.35—paid $1.25—2¢ discount.

Shopped Linden Square, Malden—bought 5 gallons—pump price 26.9¢—tank read $1.33—paid $1.23—2¢ discount.

Shopped Franklin Park Station—no discount.

Shopped McLaughlin's, Malden—no discount.

Shopped Pennelli Esso Station, Malden—no discount.

November 16—shopped Peter Traficante, Roxbury—pump price 26.9¢ (bought 6.4 gallons) tank read $1.72—paid $1.60.

Shopped Penza's, So. Boston—bought 5 gallons—received 16 stamps.

Shopped Bill's Service Station, Rte. 2, Concord—bought 9.4 gallons—pump price 27.9¢—paid $2.64.

November 8 shopped Douglas Whitehouse, Saugus—pump price 26.9¢—bought 10.9 gallons—paid $2.93.

B. On Behalf of Plaintiff

The procedure adopted by the plaintiff to establish and enforce minimum retail fair trade prices for Esso, Esso Extra and Golden Esso Extra was and is as follows:

At the inception of fair trading (August 8, 1956), a fair trade notice, in the form attached as Exhibit B to the Complaint, was mailed to all retail dealers selling plaintiff's motor fuels in Massachusetts. Within two days thereafter, a call was made upon each dealer by a company representative to be sure that notice had been received.

When the plaintiff discovers or is informed of a retail dealer selling below the minimum retail fair trade price, a call is made on the dealer by the Sales Supervisor urging compliance. If the dealer refuses, a call is made either by the District Manager or the Assistant District Manager for the same purpose. If the dealer does not then comply,

a registered letter, substantially along the lines of Exhibit C annexed to the Bill of Complaint, is sent and from that point on the matter is under the direct supervision of plaintiff's counsel. Prior to the institution of suit and still in the event of non-compliance, two shoppings are made by shoppers not employed by the company for the purpose of establishing evidence for suit. Suit is then instituted, assuming that the retail dealer has not complied.

Plaintiff obtains information on observance of its minimum retail fair trade prices as follows: Salesmen are instructed to report immediately to the District Office any violations which they discover while serving their territories. Reports of alleged violations are also received from outside sources. Plaintiff has also conducted a shopping survey (November 9 through November 13, 1956) covering 219 stations in the Boston metropolitan area. These shoppings were made by six company employees, who were instructed to check postings, and shop for discounts or giving of stamps on sales at the minimum fair trade price. These employees were selected because they were not personally known by the retail gasoline dealers they were shopping. This survey, including the time required to prepare and subsequently report, required the use of these employees for a total of about 300 working hours.

Whenever an alleged violation is reported, a shopping is made by a company representative not known to the dealer. Even if the company shopping does not show a violation, the salesman informs the dealer that a violation has been reported and urges compliance. If the company shopping shows a violation, the balance of the enforcement procedure outlined above is followed. If the company shopping does not show a violation, on occasion shopping by professionals has been nevertheless used when the plaintiff has reason to believe violations are occurring.

The following is a survey of the results of a general shopping survey made by plaintiff November 9 through November 13, 1956:

Number of retail dealers shopped—219
Number of retail dealers found posting price below fair trade—2
Number of accounts at which discounts were received bringing price below minimum retail fair trade price —3
Number of instances in which stamps were given when dealer was selling at minimum retail fair trade price —11

There follows hereafter a recitation of the steps taken by the plaintiff in connection with specific violations by Esso dealers. This includes all cases known by or called to the attention of the plaintiff from the period of August 20, 1956 through date of hearing, November 15, 1956. It excludes the first few days after the original notice of fair trade was sent during which plaintiff was primarily concerned with making certain that notice was complete and understood. The violations are broken down into three categories which are:

(a) Those dealers posting less than the stipulated minimum retail fair trade price.
(b) Those dealers giving discounts below the minimum retail fair trade price.
(c) Those dealers giving trading stamps when the gasoline is sold at the minimum retail fair trade price.

Category (A)—Posting

(1) *4648 Washington Street, Roslindale*

August 22—Matter referred to plaintiff's counsel Registered letter sent. The dealer started posting

2¢ below minimum retail fair trade price. The sales supervisor and salesman called upon the dealer. Dealer refused.

August 24—District manager and sales supervisor called on dealer. Dealer refused.

August 27—Acting assistant district manager and sales supervisor called on dealer. Dealer refused.

August 28—Suit brought.

August 29—Dealer posting fair trade prices.

Oct. 3—Dealer posting less than fair trade price.

Oct. 4—Salesman called. Dealer refused.

Oct. 7—Salesman called. Dealer refused.

Oct. 11—Motion for preliminary injunction.

Oct. 22—Preliminary injunction issued. Dealer stopped buying plaintiff's product and has thereafter sold another gasoline.

(2) *1057 Montgomery Street, Willimansett*

Aug. 20—Dealer posting below minimum retail fair trade price.

Aug. 23—Registered letter sent to dealer.

Aug. 24—Dealer posting minimum retail fair trade price.

Sept. 21—Dealer stopped selling plaintiff's gasoline and is using another gasoline.

(3) *240 West Street, Gardner*

August 20—Dealer posting less than fair trade price.

August 22—Dealer stopped selling plaintiff's product and is selling product of another supplier.

(4) *Day Square, East Boston*

(concerned in the instant case)

(5) *Waldemar Avenue, East Boston*

(concerned in the instant case)

(6) *Lawrence and Grove Street, Brockton*

August 20—Dealer posting less than fair trade price.

August 21—Dealer shopped. Sale at less than fair trade price.

August 22—Dealer shopped. Sale at less than fair trade price.

August 23—Suit brought

August 24—Dealer posting fair trade price.

(7) *40 Hampden Street, Roxbury*

Sept. 13—Dealer posting less than fair trade price.

Sept. 14—Registered letter sent. Dealer posting fair trade price.

November 3—Dealer posting less than fair trade price.

November 9—Dealer shopped. Sale at less than fair trade price. General salesman and assistant district manager called on dealer. Dealer refused. Matter referred to plaintiff's counsel and registered letter sent.

November 10 Shopped. Sale at less than fair trade price.

November 11 Shopped—Sale at less than fair trade price.

November 13 Shopped. Sale at less than fair trade price.

November 15 Suit brought.

November 16 Dealer posting fair trade price.

(8) *830 Blue Hill Avenue, Roxbury*

Nov. 9—Shopped. Sale at less than fair trade price. Later same day dealer posting fair trade price.

Nov. 13—Shopped. Sale at less than fair trade price. Referred to plaintiff's counsel. Registered letter sent.

Nov. 15—Dealer posting fair trade price.

(9) *600 County Street, East Taunton*

Aug. 20—Dealer posting less than fair trade price.

Aug. 21—Matter referred to plaintiff's counsel. Registered letter sent.

Aug. 22—Dealer posting fair trade price.

Category (B)—Discounts

By discount is meant a discount resulting in a price below minimum retail fair trade price, dealer posting either minimum or above.

(1) *291 Cambridge Street, Allston*

Nov. 14—Plaintiff advised of discount by defendant's counsel. Shopped. Discount. Registered letter sent.

Nov. 15—Referred to company counsel.

(2) *Ferry Street, Everett*

Nov. 13—Shopped. Discount.

Nov. 14—Registered letter sent.

Nov. 15—Referred to company counsel.

(3) *64 Bennett Street, Lynn*

Oct. 23—Defendant advised plaintiff of discount.

Nov. 8—Salesman called on dealer.

Nov. 9—Salesman called on dealer. Dealer said would comply. Registered letter sent. Referred to company counsel.

Nov. 12—Shopped. No discount.

Nov. 14—Shopped. No discount.

Nov. 15—Shopped. No discount.

(4) *205 Center Street, Roxbury*

Nov. 9—Shopped. No discount.

Nov. 14—Plaintiff advised of violation by counsel for the defendant. Registered letter sent. Shopped. Discount.

Nov. 15—Shopped. Discount. Called on by assistant district manager. Said would discontinue discounts.

(5) *968 Massachusetts Avenue, Roxbury*

Nov. 9—Shopped. No discount.

Nov. 14—Plaintiff advised by defendant's counsel of discount. Referred to company counsel. Registered letter sent. Shopped. Discount.

Nov. 15—Shopped. Discount.

(6) *Route 2, Concord*

Nov. 14—Plaintiff advised of violation by defendant's counsel. Matter referred to plaintiff's counsel. Registered letter sent. Shopped. No discount.

Nov. 15—Shopped. No discount.

(7) *1181 Bennington Street, East Boston*

Oct. 23—Plaintiff advised by defendant of discount.

Nov. 9—Shopped. No discount.

Nov. 10—Shopped. No discount.

Nov. 13—Shopped. No discount.

(8) *Revere Beach Parkway and Second Street, Everett*

Nov. 11—Shopped. No discount.

Nov. 14—Plaintiff advised by defendant's counsel of discount. Matter referred to plaintiff's counsel. Registered letter sent. Shopped. No discount.

Nov. 15—Shopped. No discount. Shopped. No discount.

(9) *1763 Revere Beach Parkway, Everett*

Sept. 15—Dealer posting less than fair trade prices. Acting assistant district manager, sales supervisor and salesman called on dealer. Dealer posting fair trade prices.

Oct. 23—Plaintiff advised by defendant of discount. Sales supervisor and salesman called on dealer.

Oct. 31—Dealer shopped. No discount.

Nov. 9—Dealer shopped. No discount.

Nov. 10—Dealer shopped. No discount.

Nov. 15—Dealer shopped. No discount.

(10) *105 Broadway, Everett*

Sept. 15—Dealer posting less than fair trade price. Called on by salesman. Dealer posting fair trade price.

Oct. 23—Plaintiff advised by defendant of discount. Sales supervisor and salesman called on dealer.

Oct. 24—Dealer shopped. No discount.

Nov. 9—Dealer shopped. No discount.

Nov. 10—Dealer shopped. No discount.

(11) *Route 1, Peabody, Mass.*

Oct. 23—Plaintiff advised of violation by defendant.

Nov. 10—Dealer shopped. No discount.

Nov. 14—Plaintiff advised by defendant of violation by defendant's counsel. Matter referred to plaintiff's counsel. Registered letter sent. Dealer shopped. No discount.

Nov. 15—Dealer shopped. No discount.

Category (C)—Trading Stamps

The reference to "giving stamps" means giving stamps after selling at the minimum retail fair trade price.

(1) *8 Broadway, Lynnfield*

Aug. 29—Salesman called. Dealer advised not giving stamps.

Sept. 12—Salesman called. Dealer advised not giving stamps.

Sept. 20—Defendant testified dealer had given stamps.

Sept. 21—Salesman called. Dealer said would discontinue stamps.

Sept. 26—Salesman called. Dealer not giving stamps.

Oct. 4—Salesman called. Dealer not giving stamps. Salesman called. Dealer not giving stamps.

Oct. 18—Salesman called. Dealer not giving stamps.

Oct. 23—Defendant advised plaintiff that dealer was giving stamps.

Oct. 31—Dealer shopped. Dealer not giving stamps.

Nov. 1—Sales supervisor called on dealer.

Nov. 2—District manager called on dealer.

Nov. 6—Salesman called on dealer.

Nov. 7—Matter referred to plaintiff's counsel. Registered letter sent.

Nov. 8—Dealer shopped. Stamps given.

Nov. 9—Dealer shopped. Stamps given.

Nov. 10—Dealer shopped. Stamps given.

Nov. 13—Dealer shopped. Stamps given. Dealer shopped, Stamps given. Suit brought.

(2) *Lynn Fells Parkway, Saugus*

Aug. 29—Salesman called. Dealer advised not giving stamps.

Sept. 12—Salesman called. Dealer advised not giving stamps.

Sept. 20—Defendant testified dealer giving stamps.

Sept. 21—Salesman called. Dealer admitted giving stamps. Stated would discontinue.

Sept. 24—Salesman called. Dealer advised not giving stamps.

Oct. 16—Salesman called. Dealer giving stamps.

Oct. 23—Defendant advised plaintiff dealer giving discount.

Oct. 25—Dealer shopped. Stamps given.

Oct. 30—Dealer shopped. Stamps given.

Nov. 1—Sales supervisor called. Advised by dealer would discontinue stamps.

Nov. 2—District manager called. Dealer advised would discontinue stamps.

Nov. 7—Dealer shopped. No violation.

Nov. 8—Matter referred to plaintiff's counsel. Registered letter sent.

Nov. 13—Dealer shopped. No discount.

Nov. 14—Dealer shopped. No discount.

(3) *Newburyport Turnpike, Saugus, Mass.*

Aug. 29—Salesman called. Dealer advised not giving stamps.

Sept. 12—Salesman called. Dealer advised not giving stamps.

Sept. 20—Defendant testified dealer giving stamps.

Sept. 21—Salesman called. Dealer not giving stamps.

Oct. 19—Salesman called. Dealer admitted having given stamps. Agreed to discontinue.

Oct. 23—Defendant advised plaintiff dealer giving stamps.

Nov. 6—Salesman called on dealer. Dealer denied giving stamps.

Nov. 9—Dealer shopped. No stamps given.

Nov. 14—Plaintiff advised by defendant's counsel dealer giving stamps. Matter referred to plaintiff's counsel. Registered letter sent. Dealer shopped. No stamps given.

Nov. 15—Dealer shopped. No stamps given.

(4) *602 Broadway, Saugus, Mass.*

Aug. 29—Salesman called. Dealer advised not giving stamps.

Sept. 12—Salesman called. Dealer advised not giving stamps.

Sept. 21—Salesman called. Dealer admitted having given stamps. Said would discontinue.

Sept. 24—Salesman called. Dealer advised not giving stamps.

Oct. 4—Salesman called. Dealer advised not giving stamps.

Oct. 18—Salesman called. Dealer admitted giving stamps.

Oct. 23—Defendant advised plaintiff dealer giving stamps.

Oct. 25—Dealer shopped. Stamps given.

Oct. 30—Dealer shopped. Stamps given.

Nov. 1—Sales supervisor called. Dealer said would discontinue.

Nov. 2—District manager and salesman called. Dealer reaffirmed.

Nov. 7—Dealer shopped. No stamps given.

Nov. 8—Matter referred to plaintiff's counsel. Registered letter sent.

Nov. 13—Dealer shopped. No stamps given.

Nov. 14—Dealer shopped. No stamps given.

(5) *526 Gallivan Blvd., Dorchester*

Sept. 13—Salesman called. Dealer giving stamps.

Oct. 3—Salesman called. Dealer giving stamps.

Oct. 17—Salesman called. Dealer giving stamps.

Oct. 24—Dealer posting 1¢ above fair trade minimum retail price. Giving stamps.

(6) *684 Dorchester Avenue, Dorchester*

Sept. 20—Salesman called. Dealer agreed to discontinue giving stamps at minimum retail fair trade price.

Oct. 24—Salesman called. Dealer giving stamps but selling .1¢ above fair trade minimum retail price.

Nov. 9—Shopped. Dealer giving stamps. Posting .1¢ above fair trade minimum retail price.

(7) *Mystic Avenue, Medford*

Sept. 4—Salesman called. Dealer advised would discontinue giving stamps at minimum retail fair trade price.

Sept. 11—Salesman called. No stamps.

Nov. 8—Salesman called. No stamps.

Nov. 12—Shopped. Stamps given.

Nov. 13—Shopped. Stamps given.

Nov. 14—Salesman called. Sales supervisor called. Assistant district manager called. Registered letter sent.

Nov. 15—Dealer advised assistant district manager would discontinue stamps.

Nov. 15—Shopped. No stamps.

(8) *Broadway and Prospect Streets, Cambridge*

Sept. 9—Salesman called. Dealer agreed to discontinue stamps.

Nov. 9—Shopped. Stamps received. Salesman called. Dealer agreed to discontinue stamps.

Nov. 13—Shopped. No stamps.

Nov. 14—Sales supervisor called. Not giving stamps. Registered letter sent.

(9) *235 Hyde Park Avenue, Jamaica Plain*

Sept. 5—Salesman called.

Sept. 16—Sales supervisor called.

Sept. 28—Salesman called.

Oct. 9—Salesman called.

Oct. 16—Salesman called. Registered letter sent. Shopped. Stamps received. Matter referred to plaintiff's counsel.

Oct. 23—Shopped. Stamps received.
Oct. 25—Shopped. Stamps received.
Oct. 29—Shopped. Stamps received.
Nov. 1—Shopped. Stamps received.
Nov. 7—Assistant district manager called.
Nov. 14—Plaintiff advised by defendant's counsel dealer giving stamps. Shopped. Giving stamps.
Nov. 14—Suit commenced.

(10) *Blue Hill Avenue and Walk Hill Street, Dorchester*

Aug. 30—Salesman called.
Oct. 10—Salesman called.
Oct. 25—Salesman called.
Nov. 9—Shopped. Stamps received. Salesman called. Dealer removed stamp sign.
Nov. 14—Plaintiff advised by defendant's counsel dealer giving stamps. Matter referred to plaintiff's counsel. Shopped. Stamps not given.
Nov. 15—Assistant district manager called. Registered letter sent. Shopped. No stamps given.

(11) *123 Cambridge Street, Charlestown*

Oct. 23—Plaintiff advised by defendant that dealer giving discount.
Nov. 12—Shopped. Stamps given.
Nov. 14—Salesman called. Shopped. Stamps given. Registered letter sent. Matter referred to plaintiff's counsel.
Nov. 15—Shopped. Dealer giving stamps. Charging .1¢ above minimum retail fair trade price. Salesman called. Dealer posting .1¢ above minimum retail fair trade price.

(12) *Summer and Pleasant Streets, Malden*

Oct. 17—Salesman called.
Nov. 1—Salesman called.

Nov. 12—Shopped. Stamps received. Salesman called.

Nov. 13—Salesman called.

Nov. 14—Sales supervisor called. Dealer agreed to discontinue stamps. Registered letter sent. Matter referred to plaintiff's counsel.

Nov. 15—Assistant district manager called. No stamps. Shopped. No stamps.

(13) *2024 Columbus Avenue, Roxbury*

Aug. 30—Salesman called.

Oct. 14—Salesman called.

Oct. 18—Salesman called.

Nov. 9—Shopped. Stamps received. Salesman called. Dealer increased minimum retail posted price by .1¢.

Nov. 14—Registered letter sent. Matter referred to plaintiff's counsel. Salesman and sales supervisor called. Dealer posting .1¢ above minimum fair trade retail price.

Nov. 15—Assistant district manager called. Dealer posting .1¢ above minimum fair trade retail price.

(14) *205 Western Avenue, Brighton*

Aug. 30—Salesman called.

Sept. 13—Salesman called. Dealer said would discontinue giving stamps at retail.

Sept. 16—Salesman called.

Oct. 18—Salesman called.

Oct. 24—Salesman called. Dealer posting .1¢ above minimum fair trade retail price. Giving stamps.

Nov. 9—Salesman called. Dealer posting .1¢ above minimum fair trade retail price. Giving stamps.

(15) *63 Summer Street, So. Boston*

Nov. 14—Plaintiff advised by defendant's counsel dealer giving discount. Registered letter sent. Mat-

ter referred to plaintiff's counsel. Shopped. Stamps given.

Nov. 15—Shopped. Stamps given. Shopped. No stamps. Salesman called. Dealer advised would discontinue.

(16) *149 Ferry Street, Malden*

Aug. 24—Salesman called.

Aug. 31—Salesman called.

Sept. 28—Salesman called.

Oct. 3—Salesman called.

Nov. 12—Shopped. Stamps given.

Nov. 13—Sales supervisor called.

Nov. 14—Registered letter sent. Matter referred to plaintiff's counsel.

Nov. 15—Assistant district manager called.

CHARLES W. BARTLETT
Counsel for the plaintiff

ALBERT U. ROSA
Counsel for the defendant

Opinion.

November 21, 1956

WYZANSKI, D. J.

This is a diversity jurisdiction suit to enjoin a non-signer from selling in Massachusetts at retail plaintiff's products *Esso* and *Esso Extra* at prices less than the minimum retail prices established by fair trade agreements plaintiff has made with third parties pursuant to the Massachusetts Fair Trade Law. On an application for a temporary injunction, this Court took evidence, wrote an

opinion dated October 3, 1956, and granted the preliminary relief October 5.

Further evidence was offered November 16 and 21 at a hearing on a permanent injunction. At that time it was stipulated that the transactions of plaintiff were in interstate commerce. From Exhibit 2 it appeared that the plaintiff's 1955 sales to commercial accounts in Massachusetts were as follows:

(a) Total dollar volume of commercial accounts in 1955: $3,345,702.28

(b) Total dollar volume of sales to commercial accounts using less than 5,000 gallons per year: $77,561.00

(c) Total dollar volume of commercial accounts using between 5,000 and 10,000 gallons per year: $161,881.48

(d) Total dollar volume of commercial accounts using between 10,000 and 15,000 gallons per year: $167,285.13

(e) Total dollar volume of commercial accounts using between 15,000 and 20,000 gallons per year: $119,410.76

(f) Total dollar volume of commercial accounts using between 20,000 and 25,000 gallons per year: $71,851.25

(g) Total dollar volume of commercial accounts using between 20,000 and 30,000 gallons per year: $120,735.37

(h) Total dollar volume of commercial accounts using between 30,000 and 40,000 gallons per year: $115,991.30

(i) Total dollar volume of commercial accounts using between 40,000 and 50,000 gallons per year: $166,966.58

(j) Total dollar volume of commercial accounts using between 50,000 and 75,000 gallons per year: $234,-711.43

(k) Total dollar volume of commercial accounts using between 75,000 and 100,000 gallons per year: $142,-394.77

(l) Total dollar volume of commercial accounts using in excess of 100,000 gallons per y r: $1,966,913.21

(All of the above dollar figures include Federal and State taxes of 7¢ per gallon.)

It thereafter appeared that the two retail gasoline stations operated by defendant sold in 1955 to 11 accounts 5,000-10,000 gallons each, to 9 accounts 10,000-20,000 each, to 17 accounts, 20,000-30,000 each, and to 8 accounts 30,000-40,000 gallons each. It seems to the Court plain that as to these 45 accounts plaintiff and defendant are in potential competition. Indeed if defendant is held to observe minimum prices fixed by plaintiff, some of defendant's 45 customers are almost sure to become commercial accounts of plaintiff for thus they would get a lower rate without losing much in the way of service or convenience.

Defendant's situation is not shown to be markedly different from that of many other of the more than 500 Esso gasoline service stations in Massachusetts. And the Court, therefore, finds that an unknown number of other retail gasoline service stations compete with plaintiff in reaching accounts of over 5,000 gallons annually.

From the foregoing facts I conclude that as a matter of law plaintiff is barred by §1 of the Sherman Act, 15 U. S. C. §1 from making or enforcing its re-sale price maintenance agreement against defendant.

The agreement admittedly is a restraint of trade unless it is specifically exempted by the provisos of the Miller-Tydings Act or the McGuire Act. 50 Stat. 693, 66 Stat.

632. *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305.

These provisos are not operative because the exemption conferred by them is not available "between persons . . . in competition with each other." Competition, as there used, is not confined to a situation where the producer or distributor performs the same function, or makes the same type of offers, or combines in one package the same incidental benefits as the person with whom he is said to be in competition. The statute precludes agreements between those who in fact are competitors for the same business, no matter how different their approach.

If the statute is not read in this broad way, it would follow that through the use of a so-called fair trade agreement this plaintiff would be at liberty by setting a high resale price for retail gasoline service stations to drive all their large customers into abandoning the retail outlets and securing gasoline directly from plaintiff. To assume that Congress left the door open to such potential abuse is to ignore the history and the policy as well as the language of the Sherman Act, the Miller-Tydings Act, and the McGuire Act.

The temporary injunction is vacated forthwith and plaintiff's complaint is dismissed on the merits, effective today.

WYZANSKI
United States District Judge

Judgment.

[Entered November 21, 1956.]

WYZANSKI, J. After trial and in accordance with the opinion of the Court, it is ORDERED that the preliminary injunction entered October 5, 1956, is vacated, and it is

FURTHER ORDERED that the complaint be, and hereby is, dismissed on the merits.

By the Court,

JOSEPH J. DUWAN
Deputy Clerk

WYZANSKI
USDJ
November 21, 1956

Notice of Appeal.

[Filed November 27, 1956.]

Notice is hereby given that Esso Standard Oil Company, the plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment and orders entered and filed herein on November 21, 1956.

Dated: Boston, Massachusetts, November 26, 1956.

ROBERT W. MESERVE
NUTTER, McCLENNEN & FISH
CHARLES W BARTLETT
ELY BARTLETT THOMPSON & BROWN
Attorneys for Plaintiff
294 Washington Street
Boston, Massachusetts

In the United States District Court for the District of Massachusetts.

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[34] *Afternoon Session*

The COURT. Mr. Bartlett, is this a written motion?

Mr. BARTLETT. I have not had an opportunity to put it in the form of a motion, your Honor, but I have a proposed form.

The COURT. Louder.

Mr. BARTLETT. A proposed form of injunction for your consideration. I have now quite hurriedly had an opportunity to read your opinion and directing my attention to your opinion and what was expressed here this morning, it appears that the nub of the matter is the competition between the plaintiff and the defendant, and therefore within the framework of the fair trade pattern we would like to suggest an injunction which would except this competition and still keep the fair trade procedure for all other transactions.

The COURT. As I understand—

Mr. BARTLETT. We tried to express it quite hurriedly in this modified form.

The COURT. As I understand it, the fair trade agreement which you now have does not make such an exception.

Mr. BARTLETT. No, it does not, your Honor, but as between this plaintiff and this defendant, we feel it will answer the objection. Of course we would want to reserve our right to go up on the subject anyway, but facing this [35] situation, facing this particular case, we would like to ask your Honor to make the exception.

Mr. KERESEY. Your Honor, if the question is directed toward the agreement, there has been no evidence introduced, there has been no discussion with respect to the retail fair trade agreement with other service stations.

The COURT. You mean of the signers, are you talking about that or what are you talking about now?

Mr. KERESEY. I am talking about the service stations who have signed the agreement, that is the only agreement in effect.

The COURT. I don't think that is so. I think under Massachusetts law the agreement referred to in the McGuire Act and the Miller-Tydings Act must be those with signers and those with nonsigners. Otherwise there would not be an exemption.

Mr. KERESEY. Your Honor, the only agreement is the one prescribed under Section 14A of the Massachusetts fair trade law. It is Section 14B which is the unfair competition section. In order to proceed under Section 14B we have to have in effect a fair trade agreement but the 14B section is the nonsigner clause.

Now to point up the Schwegmann case, it held that the Miller-Tydings Act did not permit actions under nonsigner clauses. The McGuire Act specifically was directed to that [36] situation and has no reference to there being in existence any contractual arrangement between—as in this case—plaintiff and defendant, that is, an action in unfair competition sounded in tort, in effect, and not in contract.

The COURT. That is what I understand, but the question is whether or not the total relationship of the signers and nonsigners must not meet the standard of the McGuire and Miller-Tydings Act in order not to be in violation of Section 1 of the Sherman Act.

Mr. KERESEY. Well, I don't understand, your Honor, what you mean by the total relationship.

The COURT. Well, it is quite plain, is it not, that if your agreement is a valid agreement, it binds the party that signed the contract, which I will call the X gasoline service station. It also affects nonsigners such as the defendant.

Mr. KERESEY. Your Honor, what binds the defendant is the nonsigner clause of the Massachusetts Fair Trade Act.

The COURT. Which would be invalid, were it not for Federal permission.

Mr. KERESEY. Which would be invalid were it not for Federal permission, as exemplified under the McGuire Act. Now that permission has been granted and completely granted under the Federal law, so it is valid and what we are seeking to do here is covered not only by the State law but by the [37] Federal law. Now what I take your opinion to mean is, your opinion is directed to these fleet account sales made by defendant.

The COURT. Well, it seems to me, may I just make it a little more explicit than apparently I have. It seems to me there is an area of competition between the gasoline service stations and the plaintiff, not only this particular defendant is in competition with the plaintiff but as far as I can tell, this defendant's situation is analogous to that of many other gasoline service stations and that there, therefore, is an area of competition between the plaintiff and gasoline service stations.

Mr. KERESEY. Your Honor, so far as the evidence produced in this Court is concerned, that is not established.

The COURT. Excuse me, I think it is, it is established. It is true in the case of the defendant, the defendant's situation is exceptional.

Mr. KERESEY. Taking the defendant's situation, we have a type of transaction here, that he is engaged in business, a portion of his business is to fleet accounts. Now as to that portion of his business, in your opinion, if he were required to sell at the minimum retail fair trade price, there would be a restraint, a restraint of trade, because he is in competition, with respect to that business, with the plaintiff. [38] Now it seems to me then, under that opinion, that all that is required is that the injunction not apply to those

sales where he is in competition. For example, suppose you had one individual who was engaged in two types of business, the same line; one, he is in competition with a brand name producer and the other he is not. Now simply because it is the same individual that does not prevent the brand name producer from having rights which he legitimately has under the Fair Trade Act. If the defendant had not produced evidence with respect to these commercial accounts, then our rights under this opinion, in the Massachusetts Fair Trade law, are there, are effective. We still have rights under the Massachusetts Fair Trade law with respect to a part of his business which it seems to me we are not competing with.

The COURT. Well, I am afraid that my opinion reaches further than you think it does. What I had concluded is, the plaintiff is in competition with retail businesses.

Mr. KERESEY. In their entirety?

The COURT. Well, I don't have to say that. Substantially, in competition, that is all that I have to do, from the point of view of the McGuire Act, consider that point.

Mr. KERESEY. At the same functional level?

The COURT. That is not in the statute, that is in the argument.

[39] Mr. KERESEY. That is in the argument. It is also in the opinion in McKesson-Robbins case.

The COURT. Yes.

Mr. KERESEY. It was defined that way in the McKesson-Robbins case and the Schwegmann case.

The COURT. "Functional level" there relates to something quite different, if I may say so; it relates to wholesale and retail. You have tried to persuade me the plaintiff is engaged in the wholesale business. I have never accepted that contention, I have scrupulously avoided ruling one way or the other upon it.

Mr. KERESEY. Well, your Honor, I come back to this point, that if regardless of categories a plaintiff could be engaged in all aspects of the business, but with respect to looking at the Massachusetts fair trade law, if there is a certain sale that plaintiff is not engaged in, then the minimum retail fair trade prices can apply, without there being any restraint of competition between the defendant in that case, and the plaintiff. They would still be competing vigorously and with no fair trade prices.

With respect to the other business, which is defined, which has been defined during this hearing—

The COURT. Go ahead.

Mr. KERESEY. —that actually is what we have attempted to express in the injunction, to have the injunction [40] relate solely to transactions which under the Act are unfair competition both under the Massachusetts fair trade law and under the McGuire Act, by which Congress has given brand name producers the right to proceed.

Now the exception, we feel, covers the area that was covered in this case. If there is difficulty with that, that is another matter that we can discuss. We made it as brief as we could.

The COURT. I am not aware that there are situations. In this case I am doubtful enough about the whole matter not to wish to change my order. I recommend it at once go to the Court of Appeals. The case is a very difficult case on the temporary injunction. I was extremely doubtful.

Now that I have heard this special aspect of the case which wasn't covered in the first hearing, I am clear that I cannot enforce the agreement as written. You are asking me to carve out a particular aspect of the agreement and hold it valid in part and invalid in part. You are not asking me to hold it invalid in part, but you are asking me to hold it valid in part.

Mr. KERESEY. Your Honor, with respect to the agreement, it isn't the agreement that we are concerned with here, it is the application of the agreement.

The COURT. That is right.

[41] Mr. KERESEY. Your opinion is we have applied this under the nonsigner clause in a way that we are not allowed to. What we are asking is, in that case, allow us to apply it in a way that we are and allow us to enforce the rights given to the extent that they are allowed.

The COURT. I think I have.

Mr. KERESEY. Could you excuse me just a moment?

[A short pause.]

Mr. BARTLETT. When we headed this, in having it typed up, over the telephone, we headed it "Injunction." What I had in mind is the interim period between now and the time the case is heard on appeal. We had the feeling that if the part to which you took exception could be eliminated, we would like to press it urgently, continuing the status quo, as to the rest.

It is a little bit like, as if the agreement itself had certain exceptions and the Appellate Court said Exception A would be no good, that would be the end of it but the balance continues. That is what we urge on you now.

The COURT. Do you want to be heard?

Mr. ROSA. Of course I was handed a copy of this as I came in the door. I do want to say, I am here as a matter of courtesy to my brother because he suggested I would have to be present to be heard. Of course I certainly oppose any tinkering, so to speak, with the injunction.

[42] The agreements they have outstanding are either valid or invalid. If they are invalid, I cannot see why they take on the 5,000 gallon figure because they themselves, on their own stipulation, say they do $67,000 worth of business, and where it is 5,000, that is only a quick impression in the

few minutes I have been here. I certainly object to any change in the Court's order.

Mr. BARTLETT. Your Honor, Mr. Rosa and I get along perfectly all right I did mention to Mr. Rosa what I was up to when I called him on the telephone and to the extent it has not been properly stated, and I think it has been, it could be modified, but fundamentally, we want to hold the rest, if we may.

The COURT. It seems to me if the plaintiff has been asking too much of the defendant, it might have been that the plaintiff would not be entitled, in any event, to an injunction, with respect to the balance, because the plaintiff might not have clean hands.

If the plaintiff's contention with respect to the defendant is a violation of the antitrust laws in connection with any aspect of the business—I don't say it is a violation of the antitrust laws and I am not passing on the clean hands thing —but it seems to me to raise separate and difficult issues, I ought not hold this case further but ought to expedite it for the Court of Appeals, where, in my opinion it belongs.

[43] Mr. KERESEY. Your Honor, with respect to unclean hands, there would have to be some intention there.

The COURT. No, if there is a violation of the antitrust laws—

Mr. KERESEY. With respect to unclean hands, which is unfairness in general.

The COURT. Excuse me, sir, if there is a violation of antitrust laws, it does not have to go beyond that.

Mr. KERESEY. The violation with respect to the antitrust laws would be in our seeking to enforce our rights under the nonsigner clause.

The COURT. Right.

Mr. KERESEY. Seeking to enforce a right under the nonsigner clause is not in itself a violation of the antitrust

laws. We believe that we have that right. Now, with respect to the agreement, as I see the agreement—

The COURT. You are mistaken about the first one.

Mr. KERESEY. Sir.

The COURT. You are mistaken about the first one, if you assert a claim by approaching a company and trying to get it to conform to your views and your views are, in good faith, but nonetheless in violation of the antitrust laws, it is clearly a violation.

Mr. KERESEY. But in equity, or in this situation, does it amount to unclean hands or is this a situation—

The COURT. I don't want to pass on that issue [44] because I think then I will get into a lot of other problems, won't I? I would like to leave this case as it is for the Court of Appeals because I, from the beginning, have thought my initial action on a temporary injunction very doubtful and I am very glad to have the matter go up to the Court of Appeals as promptly as possible. It involves a great many diverse interests and has an effect upon many people and one judge ought, if possible, to have the advice of other judges with respect to it.

Mr. BARTLETT. Your Honor, I hope it is clear to you that we obviously intend to take it to the Court of Appeals as fast as we can. I am only talking about this interim period, that is the vital point.

The COURT. Maybe the Court of Appeals will give you relief in the interim. I won't.

[Adjourned.]

Injunction.

The defendant, its servants, agents and employees and all persons acting in concert with it or under its authority and control be and they hereby are restrained and enjoined, from advertising, offering for sale or selling at retail, the plaintiff's motor fuels, "Esso" and "Esso Extra", from vending equipment bearing the plaintiff's trademarks, brands or names, "Esso" and "Esso Extra", or otherwise at prices less than the minimum retail prices now established by the plaintiff's fair trade agreements entered into by the plaintiff, except that this injunction shall not apply to sales made by the defendant to fleet accounts purchasing said motor fuels from the defendant at the rate of not less than 5,000 gallons per annum.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,
v.
SECATORE'S, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,
v.
SECATORE'S, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on May 2, 1957.

Opinions Below.

The opinion of the District Court (Wyzanski, J.) is printed in Appendix B hereto (pp. 31-33, *infra*), appears in the record filed with this petition (R. 121-124) and is reported in 1956 CCH Trade Cas., ¶ 68,547. The majority and concurring opinions of the Court of Appeals of May 2, 1957, printed in Appendix A hereto (pp. 14-25, *infra*), are reported in CCH Trade Reg. Rep. Current Decisions, ¶ 68,095.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 2, 1957 (App. A., p. 14, *infra*). Rehearing was denied on June 14, 1957, (App. A., p. 26, *infra*).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The McGuire Act exempts from the anti-trust laws all fair trade "contracts or agreements" valid under state law (paragraph (2)) and "enforcement," against non-signers, of rights created by state law (paragraph (3)). Paragraph (5) provides that "nothing contained in *paragraph (2)* of this subsection shall make lawful contracts or agreements . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." (Emphasis added.) The questions presented by this appeal are—

1. Whether paragraph (5) of the McGuire Act may be judicially interpreted so as to include a denial of the

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* The petition for rehearing was limited to securing leave to file a supplemental record appendix to petitioner's brief before the Court of Appeals to establish on the record that petitioner had, contrary to statements in the original majority and concurring opinions (App. A., pp. 22, 25, *infra*), presented to the District Court an application for a partial injunction, and for an amendment of the opinions to reflect the fact so established. The court, on the petition, granted permission to file the supplemental record appendix; the majority did not formally amend their original opinion (App. A., pp. 26-28, *infra*); the concurring judge (Aldrich, D.J.) withdrew his prior opinion of May 2, 1957 (App. A., pp. 24-25, *infra*), and substituted a new "concurring" opinion (App. A., pp. 28-30, *infra*).

exemption afforded by *paragraph* (3) and thus preclude enforcement of rights created by state law.

2. Whether, if the preceding question be answered in the affirmative, a producer-wholesaler of a trade-marked commodity may be denied the exemption afforded by paragraph (3) of the McGuire Act with respect to enforcement against a non-signer retailer because there is a class of persons who might elect to purchase either from such producer-wholesaler, under wholesale terms and conditions, or from such retailer, under retail terms and conditions.

3. Whether, if the preceding question be answered in the affirmative, such producer-wholesaler may be denied the exemption afforded by paragraph (3) to enforce its fair trade prices with respect to the greater and separable part of such retailer's business as to which there is concededly no competition between the parties.

Statute Involved.

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. § 45 (a).

See Appendix C (pp. 34-36, *infra*) for the text of this statute.

Statement of the Case.

The petitioner's complaint was brought under the diversity jurisdiction to enjoin respondent, a "non-signer," from selling, in violation of the Massachusetts Fair Trade Act,* the petitioner's trade-marked "Esso" and "Esso Extra" gasolines for less than the minimum retail prices estab-

* Massachusetts General Laws (Ter. Ed.) c. 93, §§ 14A-C.

lished by agreements, valid under said Act, between petitioner and certain of its retailers.*

The petitioner, a Delaware corporation, is engaged in the refining and wholesale marketing of petroleum products, and does a dollar volume in Massachusetts in its trademarked gasolines which amounted in 1955 to over $32,000,000 (R. 24, 93). Sales to approximately 984 retail service station dealers constitute about 90% of such volume, with the remainder being sales to about 455 so-called commercial accounts (R. 94.)† A commercial account is a business concern which has its own gasoline storage tanks and pumps and buys gasoline in tank-wagon quantities. The respondent, a Massachusetts corporation, is a retail service station dealer; all of its sales involve the dispensing of gasoline from the conventional pump into the fuel tanks of the consuming motor vehicles which come to its premises, the size of the transaction being limited by the capacity of such fuel tanks.‡ The petitioner makes no sales of this sort whatsoever, all of its deliveries being in large quantities into the storage tanks or tank wagons of its customers (R. 44).

The respondent had about 45 customers defined by it as "fleet accounts" (R. 97), on the basis of aggregate annual purchases for their various vehicles in excess of 5000

*The basis of a *prima facie* case within the Massachusetts Act (and the McGuire Act exemption) was virtually stipulated (R. 18-23), viz., that petitioner has long marketed gasoline under, and had a valuable good will in, the trade names "Esso" and "Esso Extra"; that such gasoline is sold in free, fair and open competition with gasolines produced by others; the establishment of minimum retail fair trade prices for petitioner's gasolines by agreements with other retailers; notice to respondent and the subsequent advertisement for sale and sales by the latter at below the posted prices.

†Amounting, in 1955, to slightly less than $3,350,000 (R. 103).

‡The average being 7½ gallons per sale, with a maximum in the case of long-haul trucks of 120 gallons (R. 85).

gallons a year (ranging upward to a maximum in one case of 42,000 gallons). Of petitioner's business with its commercial accounts, about one-third involved sales to accounts purchasing less than 50,000 gallons annually (R. 103-104), all of which were bulk tank wagon deliveries.

The District Court, in an opinion of October 3, 1956 (R. 65-72), initially rejected a defense that the parties were in competition with each other within the language of the proviso in paragraph (5) of the McGuire Act, and certain other defenses,* and granted a preliminary injunction requiring the maintenance by respondent of posted retail fair trade prices. Subsequently, after further development of the aforementioned evidence as to the existence of a class of respondent's customers comparable in total yearly consumption to some of petitioner's trade, the District Court ruled that the parties were "in potential competition" (R. 123) (*i.e.*, within paragraph (5)) and vacated the injunction. At this time (R. 127-132) counsel for petitioner urged unsuccessfully that the proviso did not apply as between the petitioner and a non-signer whose obligations were fixed by state law pursuant to paragraph (3) of the McGuire Act. Immediately thereafter petitioner moved in the District Court, and *pendente lite* in the Court of Appeals, for an injunction enforcing fair trade except as to sales to the fleet accounts as to which potential competition had been found; both motions were denied.

The court below affirmed the ruling of the District Court that petitioner was in potential competition with respondent (for fleet accounts) within paragraph (5) of the McGuire Act and also ruled that the Act did not contemplate or authorize fair trade enforcement even as to that separable and much greater portion of respondent's sales as to which there was no competition between the parties (p. 23, *infra*).

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* Which, since they were not reached by the Court of Appeals, do not figure, and have not been dealt with, in this petition.

Both rulings rested on the Court's interpretation of statements in the opinion in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

Reasons for Granting the Writ.

1. The interpretation of paragraph (5) of the McGuire Act reached by the court below conflicts with (*a*) the expressed intent of Congress, (*b*) the opinion of this Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and (*c*) the ruling of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E. (2d) 652 (1956).

(*a*) *The conflict with the expressed intent of Congress.*

It is respectfully submitted that the Congress that enacted the McGuire Act knew precisely what it was doing. Congress enacted the McGuire Act because it did not agree with the judicial interpretation of its intent in enacting the Miller-Tydings Act contained in the *Schwegmann* opinion (*Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)).

Section 1 (the preamble) of the McGuire Act recites that its purpose is "to protect the rights of states" to enact statutes authorizing fair trade contracts binding upon nonsigners.

The only conceivable force against which such state rights needed (and apparently still need) such protection was (and is) decisions of the federal courts such as the one below. If Congress had wanted paragraph (5) of the McGuire Act to include a denial of the exemption afforded by paragraph (3), it could and would have specifically so provided. The draftsmen knew how to make such express

provision. Witness the immediately preceding paragraph (4), which expressly refers to both the validity of contracts (paragraph 2) and the enforcement of rights against non-signers (paragraph 3). "Congress thus made as plain as words can make it that"* it was omitting from paragraph (5) any denial of the exemption afforded by paragraph (3). Nor can it be said that there is no reason for this deliberate omission. Congress did not want to sanction horizontal *agreements* in restraint of trade between competitors dealing in the same or competing commodities fixing the price at which *each* would sell (*cf. United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305). But the history of this litigation manifestly demonstrates that the petitioner is not "conspiring" in restraint of trade with its non-signer retailers. Moreover, Congress certainly may safely exempt from the antitrust laws the enforcement of rights of action created by state statutes. It is respectfully submitted that it is more logical to assume that Congress has done so when it quickly enacts legislation to counteract the effect of an opinion of this Court denying such exemption (*cf. Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384) than when it fails for thirty years to enact legislation to counteract the effect of an opinion of this Court granting such exemption (*cf. Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200). It may well be that the antitrust laws should not exempt a producer from fixing its minimum retail fair trade prices so high that a non-signer retailer could not compete with it for the business of persons who might elect to purchase either from it, under wholesale terms and conditions, or from such retailer, under retail terms and conditions. But that is a question which must be resolved by Congress and not by the courts. "We think that if there are evils in

* *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 313.

this field which now warrant application to it of the antitrust laws it should be by legislation." *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 357.

(*b*) *The conflict with the opinion of this Court.*

The decision of the court below that the exemption afforded by paragraph (3) of the McGuire Act does not apply to fair trade enforcement between parties patently not on the same functional level because of potential competition between them for a limited class of customers conflicts in principle with the opinion of this Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

The McGuire Act and the Miller-Tydings Act have historically been characterized in both the relevant Congressional history and the decisions as authorizing "vertical" fair trade enforcement, *i.e.*, between the producer (wholesaler) having an interest in the good will of the trademarked product, on one hand, and a retailer on the other.

81 Cong. Record 7487, 7495-7496, 8141 (1937).
Schwegmann Brothers v. *Calvert Distillers Corp.*, 341 U.S. 384, 389.

"Vertical" fair trade enforcement is being sought in the case at bar. The fair trade agreement is between a producer-wholesaler and a retail gasoline dealer. The suit is against a non-signer, a retail dealer, for unfair competition. There is no horizontal agreement between producers, between wholesalers nor between retailers. *McKesson & Robbins* does not support, contrary to the holding of the court below, applying paragraph (5) of the McGuire Act to bar the vertical enforcement sought herein. The defendant in the *McKesson* case was a wholesaler and the condemned agreements were with other independent wholesalers. This Court based its ruling in *McKesson* on the

ground that such agreements were between contracting parties at the same horizontal functional level. While the *McKesson* opinion contained a statement to the effect that " . . . without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other" (351 U.S. at 313), this statement was clearly intended as a response to the argument of the defendant therein that it was a manufacturer as well as a wholesaler and that, when it entered into the fair trade agreements with its independent wholesalers, it did so in its role of manufacturer, not wholesaler. Read in context, the statement does not contradict the other repeated references in the opinion to the effect that a requisite of "competition" as that term is used in paragraph (5) is that the persons involved must be on the same horizontal level (351 U.S. at 312, 313, 315, 318, 319).

The critical distinction between this case and the *McKesson* case becomes evident upon analysis of the agreements involved in the two cases. Essentially, the *McKesson* situation was an agreement between two wholesalers competing with each other for the same class of customers, both agreeing to make all sales of the same quantity of materials at not less than a minimum price.* In the instant case there was no such agreement and no such competition. While the court below found that there was "potential" competition, the "potential" meant that a retail customer of the class served by the respondent, by providing himself with the necessary facilities, could become a wholesale customer of the class served by the petitioner. The con-

*While not so expressed in the case, this may be inferred from the fact that, until the *McKesson* case, it had been commonly accepted law that the manufacturer of a trade-named product who fair-traded at the wholesale level could not himself sell it at a lower price or he would be barred from enforcing the fair trade prices (see *e.g.*, *Gillette Safety Razor Co.* v. *Green* (N.Y. Sup. Ct. 1938), 167 Misc. 251, 3 N.Y.S. (2d) 882, and other cases cited in Vol. 1, CCH Trade Reg. Rep. ¶ 3452).

tracting party in this case is a retail dealer with whom petitioner as producer and wholesaler had entered into a fair trade agreement under which the *dealer* agreed to make all retail sales of petitioner's products at no less than specified minimum prices.. The validity of the fair trade agreement was not directly attacked or questioned. The petitioner, unlike *McKesson*, did not agree to make its sales at no less than certain prices, because petitioner does not sell at the retail level of competition. Nor does the fair trade agreement prohibit the contracting dealer from making wholesale sales at any prices he may choose. The price agreement in the *McKesson* situation, by its nature, was essentially bilateral price fixing. In the instant case the fair trade agreement is clearly unilateral vertical price fixing exempt under paragraphs (2) and (3) of the McGuire Act.

The court below felt constrained to rule, solely because of "the strictness" with which the Miller-Tydings and McGuire Acts were construed by this Court in the *Schwegmann Brothers* and *McKesson* cases, "that any competition for customers is an absolute bar to price maintenance agreements between the competitors" (R. 136) and that, consequently, petitioner was prohibited by the McGuire Act from having a decree framed with respect to the great bulk of respondent-retailer's business as to which there was concededly no competition with petitioner-producer-wholesaler. On this phase of the case the court below, which obviously thought that some measure of relief was otherwise appropriate (App. A., p. 23, *infra*), failed to give that relief solely because of what it inferred to be the negative attitude of this Court toward fair trade enforcement implicit in, but not expressed in, the *McKesson* and *Schwegmann* decisions. Strict construction thus becomes frustration of a declared statutory purpose. But the question of a partial injunction was not before this Court in *McKesson* and the economic facts were markedly different from those

on which petitioner here supports its request for such relief, *i.e.*, in *McKesson* the contracting parties were in competition throughout the range of their activities; here any such competitive overlap is limited and separable.*

(c) *The conflict with the ruling of the Supreme Judicial Court of Massachusetts.*

The decision of the court below conflicts with the opinion of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 672, 132 N.E. (2d) 652, 657. It was there held that sales to employees and to "governmental agencies or to commercial or institutional establishments buying for their own use and not for resale" did not make General Electric a competitor of the non-signer retailer defendant within the McGuire Act proviso. The court, ruling that the sales in question were "merely incidental and accessory" to the basic business of the producer, concluded that both the state Fair Trade Act and the McGuire Act prohibit only "horizontal price fixing agreements between persons at the same competitive level."

2. The issue is important and should be resolved by this Court.

As a practical matter, the decision of the court below means that it is impossible for the petitioner to avail itself

* For other lower Court decisions in conflict with the construction of *McKesson* reached in the decision below herein see *Eli Lilly & Co.* v. *Rosenblum* (N.Y. Sup. Ct., April 25, 1957), 137 N.Y. L.J. No. 80, p. 8, CCH Trade Reg. Rep. Current Decisions, ¶ 68,696; *Sun Oil Company* v. *Temeles*, Essex Superior Court (New Jersey) No. C-2389-55, decided June 27, 1957; *cf. G. D. Searle & Co.* v. *Institutional Drug Distributors, Inc.*, United States District Court for the Southern District of California, Central Division, No. 19884-Y, May 17, 1957, CCH Trade Reg. Rep. Current Decisions, ¶ 68,724.

of the fair trade laws of the Commonwealth of Massachusetts. It can readily be seen that the petitioner does not have the choice of withdrawing from selling to commercial accounts in favor of retail service station dealers like the respondent. Retail service station dealers do not sell in tank-wagon quantities for delivery into storage tanks of commercial accounts, and the only result of such withdrawal would be to lose such accounts to other suppliers at the wholesale level.

It can also readily be appreciated that the holding in this case applies equally to any industry which sells both to retailers and to large consumers. If passage of title becomes the controlling factor, as it clearly has become in this case, as distinguishing a retailer from a wholesaler, an astounding number of transactions traditionally thought of as wholesale find themselves grouped as retail sales. Any industry which sells direct to the federal, state or municipal governments or industrial establishments or hotels, hospitals or charitable or educational institutions will find itself equally barred to fair-trade its products at the retail level. Such purchasers are ultimate consumers to the same extent as the commercial accounts of the petitioner, and are also potential customers of retail establishments. No further demonstration of the economic importance of this decision is necessary. The pattern here demonstrated is the general pattern of distribution in the gasoline industry, which is demonstrated by the pendency of at least three other cases involving the same problem.*

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* *Socony-Mobil Oil Company, Inc.*, v. *North Brighton Service, Inc.*, Suffolk Superior Court (Mass.) Eq. No. 71616; *Socony-Mobil Oil Company, Inc.*, v. *David S. Kornet*, Suffolk Superior Court (Mass.) Eq. No. 71619; *Sun Oil Company* v. *Temeles*, Essex Superior Court (N.J.) No. C-2389-55. In the *Sun Oil* case the issue was squarely put before that court, which arrived at a result directly contrary to that reached by the First Circuit.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5188.

ESSO STANDARD OIL COMPANY,
PLAINTIFF, APPELLANT,

v.

SECATORE'S, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY and HARTIGAN, *Circuit Judges*,
and ALDRICH, *District Judge*.

Robert W. Meserve, with whom *Charles W. Bartlett, John R. Hally, Austin Broadhurst, Nutter, McClennan & Fish* and *Ely, Bartlett, Thompson & Brown* were on brief, for appellant.
Albert U. Rosa for appellee.

OPINION OF THE COURT

May 2, 1957

WOODBURY, *Circuit Judge*. This appeal is from a judgment dismissing a complaint in a suit brought under federal

diversity jurisdiction to enjoin a "non-signer" retailer from selling the plaintiff's Esso and Esso Extra gasolines in Massachusetts for less than the minimum retail prices established therefor in fair-trade agreements entered into by the plaintiff with third party retailers pursuant to the Massachusetts Fair Trade Law, Mass. G. L. c. 93, Sec. 14A-B, quoted in material part in the margin.[1]

The plaintiff, Esso Standard Oil Company is a Delaware corporation engaged in the production, distribution and marketing of gasoline and other petroleum products throughout the United States and in foreign countries. In September, 1953, it entered into a three-year contract to take effect on May 1, 1954, with the defendant, Secatore's, Inc., a Massachusetts corporation operating two large gasoline service stations in East Boston, Massachusetts, whereby it agreed to sell to the defendant and the defendant

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[1] "Section 14A. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumer bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the Commonwealth by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

"Section 14B. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the preceding section, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby."

agreed to buy from the plaintiff, all of the buyer's requirements of Esso and Esso Extra gasolines at the seller's posted tank wagon prices "in effect at the time and place from which delivery is made."

At the time when this contract was made the plaintiff had not entered into any fair trade agreements with anyone in Massachusetts. On August 7 and 8, 1956, however, while its contract with the defendant was in force, the plaintiff negotiated resale price maintenance agreements with several of its retail dealers in Massachusetts fixing minimum retail prices for its Esso and Esso Extra gasolines. The defendant was promptly notified of these agreements and directed to observe the minimum prices therein established. It refused to do so and asserts the right to persist in its refusal unless the court orders it to comply.

It is obvious, and indeed it is freely conceded, that the plaintiff is engaged in interstate commerce. Thus its minimum price fixing agreements with its retailers, even though authorized by state law, are illegal per se under federal antitrust legislation unless exempted therefrom by the Miller-Tydings amendment, 50 Stat. 693 (1937), of sec. 1 of the Sherman Act and the McGuire amendment, 66 Stat. 632 (1952), of sec. 5(a) of the Federal Trade Commission Act.[2] *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 386 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 310, 311 (1956), and cases cited. The Miller-Tydings amendment, and in almost identical language the McGuire amendment also, provide in material part that nothing in federal antitrust legislation "shall render illegal,

[2] The McGuire amendment not only reaffirmed the policy of the Miller-Tydings amendment, but it also eliminated the restrictive effect of the Supreme Court's decision in the Schwegmann Bros. case by exempting from the antitrust laws minimum price-fixing agreements made binding by state law on "non-signers" of such agreements.

contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions'' under local law. But both amendatory acts provide that the grant of immunity from federal condemnation ''shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.''

The critical, and as we see it the controlling, question before the court below and before us is whether the plaintiff and defendant are ''corporations in competition with each other.''

With its complaint the plaintiff filed a motion for a temporary injunction and the court below held a hearing on the motion. At that hearing the defendant stipulated that practically all of the allegations of fact in the complaint could be accepted as true and made three points in defense. It asserted, first, that the plaintiff's contract with the defendant barred the relief sought, second, that the plaintiff was ''in competition'' with the defendant and its other retailers, and, third, that the plaintiff had been lax in requiring its other retailers to observe its fair trade agreements. On the basis of the evidence introduced at this hearing the court in a carefully prepared opinion rejected all of these defenses and granted the plaintiff the temporary relief for which it asked.

Later on, however, after a hearing on the merits, the court below found on the basis of further evidence that the plaintiff was "in competition" with the defendant and its other retailers. Thus it concluded that the plaintiff's price maintenance agreements were not within the exemption of the Miller-Tydings and McGuire amendments and so were illegal under federal antitrust legislation. Wherefore it vacated forthwith the temporary injunction it had granted and entered the judgment dismissing the plaintiff's complaint which is before us on this appeal.

The plaintiff-appellant not only supplies its gasolines to its retail dealers who in turn sell to ultimate consumers at their filling stations, but it also sells direct to some ultimate customers. It has several hundred so-called "commercial accounts" in Massachusetts, all of whom use a substantial quantity of gasoline per year. These for the most part are operators of fleets of trucks or taxicabs, although some of them also use gasoline for lift-trucks and other off-the-road vehicles. In many cases the plaintiff at its own expense provides, installs and maintains underground tanks and pumps on the respective premises of these customers and it delivers gasoline to them from its bulk plants by tank truck in quantities never less than 300 gallons except in emergency. It charges them one cent per gallon above its posted tank wagon price. There is no set minimum annual consumption required to qualify for a commercial account, but the plaintiff will sell to any such account on which it thinks it can make a profit. Some of these accounts use less than 5,000 gallons annually, but most of them use much more. It actively solicits this type of business and in 1955, the last year for which complete figures were available, it amounted in Massachusetts to over $3,000,000 per year, or about 10% of the appellant's gross local business.

The defendant-appellee also does a substantial annual business at its filling stations with operators of fleets of

motor vehicles. There is no evidence of the dollar volume of this business but in 1955 it had 45 accounts using over 5,000 gallons per year, so it clearly is not inconsiderable. It services these accounts at its filling stations in the customary way that filling stations generally service their customers. That is to say, the fleet operators' trucks or taxicabs are driven to the defendant's station and there the defendant's employees fill the vehicles' tanks and perform the incidental services ordinarily performed by filling station attendants.

Thus, as the District Court found, there is most certainly an area in which the plaintiff and the defendant are in competition with each other. While their competitive techniques are different, one gives less service for a lower price and the other more service for a higher price, the fact remains that each in its own way is striving for the business of supplying gasoline directly to those who operate fleets of motor vehicles. And the area of their competition is not so small that it can be disregarded by application of the de minimis maxim. Nevertheless the plaintiff-appellant contends that its competition with the defendant-appellee does not exclude application of the exculpatory provisions of the Miller-Tydings and McGuire Acts because their competition is not on the same "functional level." It argues that by application of the rule of ejusdem generis the general language of the concluding phrase, "persons, firms, or corporations in competition with each other," is controlled by the preceding reference to six specific categories of competitors, and that therefore the phrase alludes only to retailers, wholesalers etc. who go under another name in commercial jargon, as perhaps "jobbers" or "agents." Alternatively it argues that in context the final phrase refers only to the type of competition which occurs between retailer and retailer or between wholesaler and wholesaler, and so forth, which it asserts is competition in serving the

same "function." In short, by putting stress on "function" the plaintiff-appellant seeks to distinguish competition in rendering the same service from competition for the same customers.

We think these arguments must be rejected on the language and rationale of the Supreme Court in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956). The defendant in that case manufactured a line of drug products which it marketed under its own brand name and it also acted as a wholesaler of its own and other commodities sold in drugstores. It entered into resale price maintenance agreements with respect to its own branded merchandise with other wholesalers of like products and the United States proceeded against it under sec. 4 of the Sherman Act for injunctive relief asserting that the agreements constituted an illegal restraint of trade. McKesson & Robbins contended in defense that it had made the price maintenance agreements in its role of manufacturer and therefore the agreements were not "between wholesalers."

The Supreme Court, refusing to compartmentalize the defendant's business, rejected this defense. It might, perhaps, have rested its decision solely on the proposition that McKesson & Robbins was a wholesaler because it did "wholesale" selling or, alternatively, that it was more a wholesaler than a manufacturer, and hence its price maintenance agreements were "between wholesalers." But it did not so limit its rationale. It said at pages 312-13;

> "Any doubts which might otherwise be raised as to the propriety of considering a manufacturer-wholesaler as a 'wholesaler' are dispelled by the last phrase of the proviso in question, which continues the proscription against price-fixing agreements 'between persons, firms, or corporations in competition with each other.' Congress thus made as plain as words can make it

that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices."

It is true that the Court then went on to say that it had been said in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 389 (1951), that the statutory language " 'expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level,' " and followed this with the statement: "Since appellee competes 'at the same functional level' with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso prevents these agreements from falling within the statutory exemption." And on page 315 of its McKesson opinion the Court said that "the language of the proviso in question is unambiguous" and "excludes from the exemption from the per se rule of illegality resale price maintenance contracts between firms competing on the same functional level."

Thus the Supreme Court in the McKesson & Robbins case, as in the Schwegmann Bros. case, made several direct references to competition "on the same functional level." But from reading the opinions in both cases in their entireties we think the Supreme Court in each instance was using the phrase in a descriptive rather than a restrictive sense. The word "functional" itself is not precise in meaning and it does not seem to have any clear significance in either case. In neither case is the word defined and it may well have been used in contradistinction to "categories or labels" to broaden the construction of "competition" beyond that between businesses of the same nomenclature. Indeed, this interpretation is in keeping with the admonition, to be considered more fully later, that the exemption accorded by Congress in the Miller-Tydings and

McGuire Acts from the ban of the Antitrust Acts is to be narrowly construed. As we read the long quotation from the McKesson & Robbins case above, "categories or labels" are not the "crucial inquiry." What is determinative is "whether the contracting parties compete with each other." The parties before us on this appeal, as we have shown, are in a real sense competing with each other for the business of a not insubstantial class or type of consumers of gasoline. Although their techniques of doing business differ, they are nonetheless competitors, and th excludes application of the exemption from antitrust legislation.

In short, we think the Antitrust Acts are not so much concerned with the preservation of competition in performing given functions as such as they are with preserving to consumers the benefits which result from competition between different businesses to serve a particular consumer need. And we do not think that Congress in the Miller-Tydings and McGuire Acts intended to limit or restrict full achievement of that major concern.

But the appellant contends that even though there is competition between the parties to a limited extent, nevertheless it is entitled to injunctive relief as to the separate class of business for which it and the defendant do not actually or potentially compete. That is to say, it contends that it is entitled to enforce resale price maintenance with respect to that separable portion of the defendant's trade as to which it does not compete, *i.e.* ordinary retail sales in relatively small amounts to the ordinary run of motorists.

The appellant did not make this suggestion in the court below. Thus there may well be unexplored practical difficulties, if not difficulties under local statutes, which would render it inexpedient to grant the partial relief asked for. This does not prevent us from considering the suggestion, however, for we could remand for further hearing. But we

shall not take that course for we do not think the statute permits the partial relief requested.

No authority is cited for a grant of limited relief, and the possibility of granting such relief is not mentioned in any case which has come to our attention. Nevertheless, it can be said that the Miller-Tydings and McGuire amendments do not specifically forbid it, and in the many situations in which wholesalers and retailers in general are in competition for large accounts, to allow partial relief of the sort requested would effectuate the avowed purpose of the amendment to permit price maintenance as to trade marked or brand named goods in order to prevent destructive cutthroat competition and to cure the evils attendant upon the use by some retailers of "loss leaders." We cannot accept the argument, however, in view of the strictness with which the amendments were construed in the Schwegmann Bros. case, and also in the McKesson & Robbins case, wherein at the conclusion of the Court's opinion on page 316 it is said: "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." Our conclusion, therefore, is that any competition for customers is an absolute bar to price maintenance agreements between the competitors.

This conclusion renders unnecessary any consideration of the other defenses raised below and of the additional defense suggested on this appeal that gasoline cannot be fair traded under the Miller-Tydings and McGuire Acts because it is not "a commodity which bears, or the label or container of which bears, the trademark, brand, or name" of its producer.

A judgment will be entered affirming the judgment of the District Court.

ALDRICH, *District Judge,* (concurring).

It seems to me that the McGuire Act is a very practical act. It does not, contrary to appellant's argument, exempt from permissible fair trade agreements contracts between "producers, wholesalers, brokers, factors, retailers, or other persons in competition with each other," which might call for the application of the rule of ejusdem generis to limit competition to so-called horizontal levels, but reads "persons," not "other persons." Hence it withholds approval of agreements, express or by operation of law, between all competitors. If there were doubt of this interpretation the history and purpose of the Sherman Act, and the fact that McGuire's intent is to carve limited exceptions thereto, would supply the answer. True, since most competition is on horizontal levels, courts in particular cases may naturally fall into the use of that terminology. But, as appellant suggests as to the Sherman Act, quoting from *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, at 615, ". . . the Act deals with competitive realities, not words." If bona fide competition exists here, I see no basis for restricting the language of the statute.

Competition has many meanings. In a sense the movie house and the television retailer are in competition with each other for the "amusement dollar." But here the essential commodity, gasoline, is the same. The servicing, etc., may be only the fringe. If owners of fleets of trucks or taxicabs may be influenced in their choice of purchasing gasoline from appellant or appellee by the question of price, I believe the latter are "persons . . . in competition with each other" within the Act. I cannot say that the finding below that they are is plainly wrong.

However, I am not happy with that portion of the majority opinion which states that as matter of law an injunction may not issue as to that portion of appellee's business which does not compete with appellant. Since appellee has

prevailed upon realities, I do not see how one must ignore a reality that to a substantial extent the parties may not compete at all. This is not a case of either enforcing, or striking down, some particular agreement, depending upon its nature. If appellee is involved in two separable activities, I believe it an over-simplification to say that because in one it is a "person in competition," it is as to the other. If appellant manufactured gasoline and toothpaste, fair-traded both, and sold one in competition with appellee, but not the other, would injunctive relief be denied as to both?

So far as *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, may be thought to suggest the contrary, I would distinguish it on the ground that here we are involved with a non-signer whose obligations depend upon his activities, now made coverable by McGuire. However, the precise nature of these activities, and the important considerations leading to a determination as to their separability, present issues of fact which were not presented to the District Court, because this contention was not there advanced. Since my brethren do not accept the principle it is not important for me to decide whether I would remand the case for further consideration, or whether, which is possible, I would say that the matter not having been presented below, it is too late to raise it here. Likewise, it is equally unnecessary, under the circumstances, for me to reach the question of labeling, which would have to be decided before the case would be sent back, I am, accordingly, content to concur in the judgment of affirmance, subject to the above reservations.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5188.

ESSO STANDARD OIL COMPANY,
PLAINTIFF, APPELLANT,
v.
SECATORE'S, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY and HARTIGAN, *Circuit Judges*, and ALDRICH, *District Judge*.

Robert W. Meserve, with whom *Charles W. Bartlett, John R Hally, Austin Broadhurst, Nutter, McClennan & Fish* and *Ely, Bartlett, Thompson & Brown* were on brief, for appellant.
Albert U. Rosa for appellee.

OPINION OF THE COURT

ON PETITION FOR REHEARING.

June 14, 1957.

WOODBURY, *Circuit Judge*. In the majority opinion of the court and also in Judge Aldrich's concurring opinion it is stated in substance that the plaintiff-appellant did

not ask the court below for injunctive relief limited to the separate class of business for which it and the defendant-appellee were not in either actual or potential competition. On this petition for rehearing the plaintiff-appellant asserts that actually it did ask the court below for such limited relief and that the court denied it, and it points to the typewritten transcript to prove its assertion. For relief it asks us to amend our opinions to conform to the fact thus established and for leave to add to the record appendix to its brief by printing as a supplement thereto the portions of the typewritten record on which it relies.

Our Rule 24(1) permitting appellants to proceed on record appendices to their briefs requires that relevant docket entries, the charge or judgment below, and certain other matters, be printed therein, and also "such other parts of the record, material to the questions presented, as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions." Certainly whether the plaintiff-appellant asked the District Court for the limited injunctive relief which is asserted on appeal it was entitled to is material. This plaintiff-appellant should, therefore, have printed in its original appendix the matter which it now asks for leave to print in a supplement. While we are free if we wish to scan the original record made in the court below, we are not under any obligation to thumb through that often voluminous record to see whether an appellant has failed to print in the appendix to his brief some part of it material to the questions he presents to us on appeal. Were that our duty the appendix system would have little or no point. It is the appellant's duty to print in his appendix the parts of the record essential for us to read in order to decide the questions he presents, and if he fails to do so, he runs the risk of coming before this court on an inadequate record on appeal.

However, we are disposed to be lenient in this particular case, for even though we did not accord controlling significance to the appellant's failure to ask the court below for limited injunctive relief, which we assumed from the record appendix to its brief to be the fact, we nevertheless see no reason why the relief for which it asks in this petition for rehearing should not be granted to the end that the actual fact may appear on the records of this court.

Leave is granted to the plaintiff-appellant to file a supplemental record appendix to its brief in the form submitted with its petition for rehearing, and an order will be entered denying the petition for rehearing.

ALDRICH, *District Judge,* (concurring)

I concur in Judge Woodbury's opinion on rehearing. However, now that it appears that appellant did raise the matter of partial injunctive relief below, I feel I must face up more squarely to that issue. Upon further consideration my prior concurring opinion is now withdrawn in toto, and the following observations substituted.

I do not quarrel with the view that the parties are "persons in competition with each other." The McGuire Act does not, contrary to appellant's argument, exempt from permissible fair trade agreements contracts between "producers, wholesalers, brokers, factors, retailers, or other persons in competition with each other," which might call for the application of the rule of *ejusdem generis* to limit competition to so-called horizontal levels, but reads "persons," not "other persons." Hence it withholds approval of agreements, express or by operation of law, between all competitors. If there were doubt of this interpretation the history and purpose of the Sherman Act, and the fact that McGuire's intent is to carve limited exceptions thereto, would supply the answer. True, since most competition is on horizontal levels, courts in particular cases may

naturally fall into the use of that terminology. But, as appellant suggests as to the Sherman Act, quoting from *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, at 615, ". . . the Act deals with competitive realities, not words." If bona fide competition exists here, I see no basis for restricting the language of the statute.

Competition has many meanings. In a sense the movie house and the television retailer are in competition with each other for the "amusement dollar." But here the essential commodity, gasoline, is the same. The servicing, etc., may be only the fringe. If owners of fleets of trucks or taxi-cabs may be influenced in their choice of purchasing gasoline from appellant or appellee by the question of price, I believe the latter are "persons . . . in competition with each other" within the Act. I can not say that the finding below that they are is plainly wrong. But if the parties are thus persons in competition it is because of appellee's unusual activities distinguishing it from other retailers whose business is less extensive. If those activities are truly severable, it seems arguable that the bar to appellant's injunction should be equally so. If appellant manufactured, and fair-traded, both gasoline and toothpaste, and appellee sold both, but the parties were actually in competition only as to the former, I could not say they were persons in competition as to both.

However, I suggest appellant's rights here are lost not because of appellee's special activities which made them persons in competition, but because its own activities made it a retailer. Agreements between retailers are not protected. The statute supplies no definition of retailer. The dictionary supplies two: one who sells in small quantities, and one who sells to the ultimate consumer. Of these the latter seems the more in keeping with the concept of the Fair Trade acts. It clearly covers appellant's "commercial accounts."

Either competition or retailing would result in the denial of complete relief to appellant, but the second must be fatal to even partial relief. It would be one thing to say that with respect to separable activities as to which the parties were not competing they were not "persons in competition with each other." It would be quite another to say that if appellant is to be classed as a retailer it can escape the force of the Act, even in part, by showing it is something additional. Price-fixing agreements between retailers are invalid per se, irrespective of the area of competition. On this basis there could be no possible issue of partial relief.

Appendix B.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Opinion.

November 21, 1956

Wyzanski, D. J.

This is a diversity jurisdiction suit to enjoin a non-signer from selling in Massachusetts at retail plaintiff's products *Esso* and *Esso Extra* at prices less than the minimum retail prices established by fair trade agreements plaintiff has made with third parties pursuant to the Massachusetts Fair Trade Law. On an application for a temporary injunction, this Court took evidence, wrote an opinion dated October 3, 1956, and granted the preliminary relief October 5.

Further evidence was offered November 16 and 21 at a hearing on a permanent injunction. At that time it was stipulated that the transactions of plaintiff were in interstate commerce. From Exhibit 2 it appeared that the plaintiff's 1955 sales to commercial accounts in Massachusetts were as follows:

(a) Total dollar volume of commercial accounts in 1955: $3,345,702.28

(b) Total dollar volume of sales to commercial accounts using less than 5,000 gallons per year: $77,561.00

(c) Total dollar volume of commercial accounts using between 5,000 and 10,000 gallons per year: $161,881.48

(d) Total dollar volume of commercial accounts using between 10,000 and 15,000 gallons per year: $167,285.13

(e) Total dollar volume of commercial accounts using

between 15,000 and 20,000 gallons per year: $119,410.76

(f) Total dollar volume of commercial accounts using between 20,000 and 25,000 gallons per year: $71,851.25

(g) Total dollar volume of commercial accounts using between 20,000 and 30,000 gallons per year: $120,735.37

(h) Total dollar volume of commercial accounts using between 30,000 and 40,000 gallons per year: $115,991.30

(i) Total dollar volume of commercial accounts using between 40,000 and 50,000 gallons per year: $166,966.58

(j) Total dollar volume of commercial accounts using between 50,000 and 75,000 gallons per year: $234,711.43

(k) Total dollar volume of commercial accounts using between 75,000 and 100,000 gallons per year: $142,394.77

(l) Total dollar volume of commercial accounts using in excess of 100,000 gallons per year: $1,966,913.21

(All of the above dollar figures include Federal and State taxes of 7¢ per gallon.)

It thereafter appeared that the two retail gasoline stations operated by defendant sold in 1955 to 11 accounts 5,000-10,000 gallons each, to 9 accounts 10,000-20,000 each, to 17 accounts, 20,000-30,000 each, and to 8 accounts 30,000-40,000 gallons each. It seems to the Court plain that as to these 45 accounts plaintiff and defendant are in potential competition. Indeed if defendant is held to observe minimum prices fixed by plaintiff, some of defendant's 45 customers are almost sure to become commercial accounts of plaintiff for thus they would get a lower rate without losing much in the way of service or convenience.

Defendant's situation is not shown to be markedly different from that of many other of the more than 500 Esso gasoline service stations in Massachusetts. And the Court, therefore, finds that an unknown number of other retail

gasoline service stations compete with plaintiff in reaching accounts of over 5,000 gallons annually.

From the foregoing facts I conclude that as a matter of law plaintiff is barred by §1 of the Sherman Act, 15 U. S. C. §1 from making or enforcing its re-sale price maintenance agreement against defendant.

The agreement admittedly is a restraint of trade unless it is specifically exempt by the provisos of the Miller-Tydings Act or the McGuire Act. 50 Stat. 693, 66 Stat. 632. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305.

These provisos are not operative because the exemption conferred by them is not available "between persons . . . in competition with each other." Competition, as there used, is not confined to a situation where the producer or distributor performs the same function, or makes the same type of offers, or combines in one package the same incidental benefits as the person with whom he is said to be in competition. The statute precludes agreements between those who in fact are competitors for the same business, no matter how different their approach.

If the statute is not read in this broad way, it would follow that through the use of a so-called fair trade agreement this plaintiff would be at liberty by setting a high resale price for retail gasoline service stations to drive all their large customers into abandoning the retail outlets and securing gasoline directly from plaintiff. To assume that Congress left the door open to such potential abuse is to ignore the history and the policy as well as the language of the Sherman Act, the Miller-Tydings Act, and the McGuire Act.

The temporary injunction is vacated forthwith and plaintiff's complaint is dismissed on the merits, effective today.

WYZANSKI
United States District Judge

Appendix C.

McGuire Fair Trade Amendment.

Act of July 14, 1952, 66 Stat. 631.
15 U.S.C. § 45 (a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to

intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate

commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

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JOHN T. FEY, Clerk

No. 317.

In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY,
Petitioner,

v.

SECATORE'S, INC.,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOSEPH AUERBACH,
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185 Devonshire Street,
Boston 10, Massachusetts.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

ESSO STANDARD OIL COMPANY, PETITIONER,

v.

SECATORE'S, INC., RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The respondent, Secatore's, Inc., opposes the petition filed by Esso Standard Oil Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on May 2, 1957, and prays that the petition be dismissed and certiorari denied.

Opinions Below.

The opinions of the District Court and of the Court of Appeals appear as indicated in the petition filed by Esso Standard Oil Company herein (Petition, p. 1).

The Question Presented.

Where the trial court has found that two parties are in substantial competition, one with another, in the sale of gasoline to ultimate consumers, and the intermediate appellate court has affirmed that finding, should this Court grant certiorari upon the petition of one of those parties who seeks thereby to compel the other, a non-signer, to observe the terms of its price maintenance contracts?

Statute Involved.

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. § 45(a): See Petition, Appendix C, pp. 34-36, for this statute.

Statement of the Case.

The nub of this case is that petitioner, Esso, has pegged the resale price of its gasoline to ultimate consumers at 20.9 cents per gallon and insists that the respondent, a non-signer, observe that price, notwithstanding that petitioner itself sells to ultimate consumers at 16.1 to 17.1 cents per gallon (R. 33, 34).

The respondent is unable to adopt the petitioner's statement of the case (Petition, pp. 3-6) except as stated hereinafter, for the reason that, in addition to certain self-serving characterizations,* the petitioner's statement is in material respects contradicted by the record.†

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*Throughout the petition the petitioner characterizes itself as a "producer-wholesaler" or a "wholesaler," engaged in "wholesale" marketing in contrast with the respondent, characterized as a "retailer" making "retail" sales (Petition, pp. 3, 4, 7, 8, 9, 10, 12). These euphemisms are self-serving, and seem designed to beg the question of the case by studied repetition of "categories and labels." Cf. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, at 312, 313. The majority of the Court of Appeals never used these characterizations (Petition, pp. 14-23), and the concurring opinion classes petitioner as a "retailer" (Petition, p. 29). The District Court, Wyzanski, D.J., addressing petitioner's counsel, R. 130, said: "You have tried to persuade me the plaintiff is engaged in the wholesale business. *I have never accepted that contention. . . .*"

†See Appendix, *infra*, p. 11.

The petitioner, Esso, is a Delaware corporation, engaged in refining and marketing petroleum products. In the words of Mr. Justice Woodbury, "the plaintiff-appellant not only supplies its gasolines to its retail dealers who in turn sell to ultimate consumers at their filling stations, but it also sells direct to some ultimate customers" (Petition, p. 18). More than 10% of its gasoline sales in Massachusetts in 1955 were to ultimate consumers (R. 94, 103; Petition, p. 4). There is no set minimum size or volume below which petitioner will not sell to such accounts; petitioner will sell to ultimate consumers wherever it will make a profit (R. 35). In fact, in 1955, petitioner's sales to consumer accounts using less than 5000 gallons per annum ($77,561) exceeded its sales to accounts using 20,000-25,000 gallons ($71,851.25) (R. 103; Petition, pp. 31, 32). The petitioner has salesmen constantly soliciting consumer accounts (R. 45). The actual breakdown of petitioner's Massachusetts accounts shows 984 service station accounts and 455 direct consumer accounts (R. 26 and 94).

The respondent, a Massachusetts corporation, operates two gasoline stations, considered large in metropolitan Boston, with a combined annual sales volume in 1955 exceeding 2,500,000 gallons of Esso gasoline (R. 86, 100). In 1955 respondent had 46 accounts purchasing in excess of 5000 gallons per annum, including one account purchasing 42,000 gallons per annum (R. 97). The 46 accounts consuming in excess of 5000 gallons per annum constituted more than 25% of respondent's business (R. 86 and 97).

The petitioner, the respondent, and other Esso dealers, all sell Esso gasoline directly to operators of fleets of vehicles, and to comparable accounts (R. 45, 50, 80, 88, 89, 96, 97, 98). In every area where the petitioner has a consumer account to which it sells gasoline there exists an Esso dealer (R. 94). The parties to this case are in actual competition for customers consuming annually

amounts of Esso gasoline ranging from less than 5000 gallons (R. 103) to in excess of 40,000 gallons (R. 97, 98).

The Court of Appeals on these facts held:

> ". . . there is most certainly an area in which the plaintiff and the defendant are in competition with each other. While their competitive techniques are different, one gives less service for a lower price and the other more service for a higher price, the fact remains that each in its own way is striving for the business of supplying gasoline directly to those who operate fleets of motor vehicles." (Petition, p. 19.)

> ". . . The parties before us on this appeal, as we have shown, are in a real sense competing with each other for the business of a not insubstantial class or type of consumers of gasoline. Although their techniques of doing business differ, they are nonetheless competitors, and this excludes application of the exemption from antitrust legislation." (Petition, p. 22.)

Argument.

Certiorari should be Denied.

1. So Long as a Seller is in Substantial Competition with a Buyer of his Commodity, he Cannot Legally Fix the Resale Price of That Commodity.

Petitioner originally sought to enjoin respondent from selling any of its gasoline at less than the resale price fixed by petitioner. Judge Wyzanski refused to grant the injunction when it appeared upon the trial that petitioner was in competition with respondent for a substantial volume of accounts.

Petitioner then modified its request by asking the trial court to enjoin respondent only as to those sales for which petitioner allegedly did not compete. Judge Wyzanski declined to entertain this request, saying that he would leave the case where it stood for the Court of Appeals; but the record is clear that, in his opinion, to grant such relief would permit petitioner to establish a state-wide minimum price and then undercut that price for such business as petitioner might choose (Petition, p. 33; R. 124).

Petitioner fared no better in the Court of Appeals, which unanimously sustained the trial court.

Petitioner now applies to this Court, in form at least, for the whole relief which it sought in the trial court. The bait that it casts to excite the interest of this Court is the theme (1) that the sales which it makes to ultimate consumers are in fact distinguishable and separable from the bulk of the sales made by respondent to consumers, and (2) that the McGuire Act should be interpreted to permit petitioner to compete in price when it chooses to sell to an ultimate consumer and to freeze the price when it does not.

Respondent submits that this argument has no basis in fact or in law, and that, if the argument were adopted, petitioner could fix a state-wide price for the sale of its gasoline, and then sell under that price to selected consumers. In fact, that is precisely what petitioner has been doing, even installing and maintaining storage tanks and pumps for such customers in order to secure their patronage (R. 34, 45, 46, 87).

The record establishes that petitioner sells to consumer accounts, which its salesmen solicit, at 16.1 to 17.1 cents per gallon (R. 34). Respondent sells at 18.9 cents (R. 5). Within this range respondent can successfully compete by offsetting the higher price by greater service (Petition, p.

19). One of petitioner's principal objects in the present proceeding is to eliminate this competition on respondent's part by requiring respondent to charge 20.9 cents on such sales (R. 33).

To support its argument on the facts, petitioner speaks of "potential" competition. The trial and appellate courts found actual and substantial competition (Petition, pp. 19, 22, 33). The petitioner claims that as to "the great bulk of respondent-retailer's business . . . there was concededly no competition" (Petition, p. 10). No such concession was made, and the record, to the contrary, bears out the finding that competition between the parties was substantial. Both parties engage heavily in sales to customers consuming less than 5000 gallons a year (R. 103; Petition, pp. 31, 32); and both engage heavily in sales to customers consuming in excess of 5000 gallons a year (R. 96-97).*

Petitioner's attempt, of course, is to persuade this Court that petitioner is a wholesaler and that respondent is a retailer. Rejecting this argument, Judge Wyzanski said: "You have tried to persuade me the plaintiff is engaged in the wholesale business. I have never accepted that contention . . ." (R. 130).

Regardless of labels, whenever petitioner sells to an ultimate consumer, it competes with respondent, either actually or potentially, and every one of such sales which satisfies the need of an ultimate consumer deprives respondent of an actual or potential customer at its pumps.

To support its argument on the law petitioner contends that the lower courts have interpreted section 5 of the McGuire Act in a way which (*a*) defeats the intent of Con-

*Petitioner's statement that respondent's "average sale" is 7½ gallons (Petition, p. 4, footnote 3) has no support in the record, but is derived from average "typical" gasoline stations, size and location unspecified (R. 84, 85).

gress, (*b*) conflicts with this Court's decision in *McKesson* and (*c*) conflicts, as well, with the decision of the Supreme Judicial Court of Massachusetts in *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665. None of these arguments will stand analysis.

(*a*) *There is no conflict with the expressed intent of Congress.*

In *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, this Court held that price fixing had been exempted from the anti-trust laws only as between parties to "fair trade" contracts, and that it could not be enforced against nonsigners. Congress was thereupon persuaded to pass the McGuire Act amending section 5 of the Federal Trade Commission Act so as to make "fair trade" contracts binding upon non-signers as well as upon those who expressly consented to be bound. This is the function of section (3) of the McGuire Act.

Petitioner would have this Court believe that by the McGuire Act, Congress intended to permit petitioner to enter into a "fair trade" contract with one dealer, and then use that contract to tie the hands of another, while at the same time competing with that other for a substantial volume of business by undercutting the price so established.

There is no justification for the belief that Congress intended to go to such lengths. The scheme of the McGuire Act is clear, and it can be enforced without giving rise to any such distortion of purpose: section (2) exempts "fair trade" contracts from the anti-trust laws; section (3) makes such contracts binding on non-signers; section (4) copper-rivets the exemption not only as to the making but

as to the enforcement of the contracts; and section (5), in order to preserve competition, states that the contracts in question shall not be exempt if they are "between persons, firms, or corporations in competition with each other."

When section (3) speaks of "such contracts" as being enforceable against non-signers, it refers to contracts specified in section (2), and of course it can only mean contracts valid under section (2). Contracts "between persons, firms or corporations in competition with each other" are outlawed by section (5), and hence are not validated by section (2) or enforceable against non-signers under section (3).

It follows that, if petitioner had entered into a "fair trade" contract with respondent, the contract would be illegal and unenforceable as one "between persons, firms or corporations in competition with each other." Petitioner's contention is that the contract should nevertheless be enforceable against respondent because it was not signed by respondent. Petitioner's argument, in final analysis, is that Congress intended, by passing the McGuire Act, to bind non-signers by contracts which would have been illegal and unenforceable if they had signed them. This is manifestly absurd.

(*b*) *There is no conflict with the opinion of this Court.*

In *McKesson* this Court held that a manufacturing pharmaceutical house could not fix its prices at wholesale under fair trade agreements with wholesalers while at the same time engaging itself in wholesaling operations.

Petitioner points out that the contracts in *McKesson* were between competing wholesalers and therefore effected so-called "horizontal" price fixing which does not share the exemption accorded to "vertical" price fixing by the McGuire Act. It does not at all follow, as peti-

tioner argues, that by outlawing the McKesson contracts this Court sanctioned the Esso contracts. In the case at bar, as in *McKesson*, the petitioner and the respondent are directly competing for the same customer—in this case the ultimate consumer; and in *McKesson* this Court said, referring to the final clause of section 5 of the McGuire Act:

> "Congress thus made as plain as words can make it that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices."

Far from conflicting with *McKesson*, the holding of the lower courts in the case at bar is founded on and supported by *McKesson* (Petition, pp. 20-21).

(c) *There is no conflict here with the Supreme Judicial Court of Massachusetts.*

In *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, the Supreme Judicial Court of Massachusetts held that the sales there in question were merely incidental and accessory to the manufacturing business of the General Electric Company. In the case at bar the sales came to $3,345,702.28 (R. 103, Exh. 2), constituted 10% of the petitioner's business (R. 94 and 103) and were made to approximately one-third of petitioner's accounts in Massachusetts (R. 26 and 94). Petitioner employed salesmen constantly to solicit such accounts (R. 45). There was nothing either incidental or accessory about them.

The conflict which petitioner suggests between the case at bar and the *Kimball* case is therefore not supported by the *Kimball* opinion.

2. No Issue which Warrants the Granting of Certiorari is Presented by the Petition.

Petitioner concludes its argument by asserting that "the decision of the court below means that it is impossible for the petitioner to avail itself of the fair trade laws of the Commonwealth of Massachusetts" and suggests that the same consequence will ensue for other fair traders (Petition, pp. 11-12).

We respectfully disagree. In the first place, it is not true that petitioner cannot "avail itself of the fair trade laws of the Commonwealth of Massachusetts." "Fair trade" presents an exception to the anti-trust rule against price fixing. If petitioner wishes to avail itself of the exception, it need only abide by the rules and withdraw from competition with its own Massachusetts dealers.

In the second place, we are dealing here with facts, not theory; the case having been tried on the merits, the trial court found as a fact that the parties were in substantial competition for the same accounts. There is nothing in the record to support the suggestion that the same facts obtain in the case of other "fair traders."

Conclusion.

The petition should be dismissed.

Respectfully submitted,

JOSEPH AUERBACH,

ALBERT U. ROSA,

Attorneys for Respondent.

Appendix.

1. Petitioner defines "commercial account" as "a business concern which has its own gasoline storage tanks and pumps and buys gasoline in tank-wagon quantities" (Petition, p. 4). Petitioner does not cite the record for this definition. The record shows that petitioner has two "types of accounts, dealer and commercial," and that a "commercial account" is nothing more than a consumer rather than a dealer buying direct from petitioner (R. 32). The record shows that in many cases where such accounts do not "have their own" tanks and pumps the petitioner supplies and maintains such equipment, at its own expense (R. 34, 45, 46, 87), and the Court of Appeals so found (Petition, p. 18), and that, in those cases where consumer accounts do have tanks and pumps, that equipment belonged to the previous supplier, and is transferred to the ownership of the petitioner (R. 46). The record shows that such accounts do not buy in "tank-wagon quantities," if this phrase means whole tank wagons at a time (3500 to 6000 gallons, R. 83), but in fact take deliveries in quantities as small as 100 gallons (R. 33).

2. Petitioner states that the "size of transactions" of the respondent is limited by the size of the fuel tank into which gasoline is pumped, implying that respondent cannot make a sale larger than the capacity of a single vehicle or tank (Petition, p. 4). The record does not support this; respondent obviously may make one sale to several vehicles as part of a "fleet" (R. 96, 97).

3. Petitioner states that its "Fair Trade" agreements were "valid under said Act," referring to the Massachusetts Fair Trade Act (Petition, p. 4). The record shows that respondent agreed that petitioner acted "pursuant" to the Massachusetts Act in entering the agreements, and

that the agreements were in effect (R. 19), but there is no stipulation or finding of "validity."

4. Petitioner states that it makes deliveries into "tank wagons of its customers" (Petition, p. 4). The record contains no evidence whatsoever of any customers owning or having any tank wagons.

5. Petitioner states that the "court below affirmed the ruling of the District Court that petitioner was in potential competition with respondent for fleet accounts" (Petition, p. 5). An accurate statement of the actual ruling of the Court of Appeals is, in the Court's own words: "Thus, as the District Court found, there is most certainly an area in which the plaintiff and the defendant are in competition with each other" (Petition, p. 19).

6. Petitioner implies that the Court of Appeals "also" ruled that there was a "separable . . . portion of respondent's sales as to which there was no competition between the parties" (Petition, p. 5). The Court made no such ruling or finding, but merely dealt with such a *contention* by the petitioner (Petition, p. 22).

7. Petitioner makes the statement that, when the District Court found "potential" competition between these parties, the word "potential" meant that one of respondent's customers, *"by providing himself with the necessary facilities,"* could become a customer of the petitioner (Petition, p. 9). If there is any fact clearly established in the record and in the opinion of the Court of Appeals, it is that the petitioner supplies these facilities where necessary and at its expense (R. 34, 45, 46, 87; Petition, p. 18), and, where these facilities already exist, they are transferred from the ownership of the former supplier to the ownership of the petitioner (R. 46).

8. Petitioner states that respondent defines "fleet account" as a customer making aggregate annual purchases

in excess of 5000 gallons (Petition, p. 4). This statement is not superficially supported by the record, wherein respondent testified to forty-six accounts purchasing in excess of 5000 gallons annually, and stated that respondent had forty-five "fleet accounts" (R. 97). But if the effort of petitioner's statement is to make the whole record define "fleet accounts" as accounts purchasing in excess of 5000 gallons annually, then petitioner's own evidence in the record shows this is not true. Petitioner's definition of its own "commercial accounts" includes the following: "A commercial account is *a trucking account primarily* . . ." (R. 32); "Commercial accounts include . . . *truckers, fleet operators* . . . and taxi-cab accounts" (R. 80). And petitioner admits that it sells to such accounts in volumes less than 5000 gallons per year, and that such sales exceed those to 20,000 gallon accounts (R. 103; see Petition, pp. 31, 32).